THE INDIAN DECISIONS, NEW SERIES.

CALCUTTA, Vol. XI.

THE

INDIAN DECISIONS

(NEW SERIES)

Being a re-print of all the Decisions of the Privy Council on appeals from India and of the various High Courts and other Superior Courts in India reported both in the official and non-official reports from 1875

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I. L. R., 22 CALCUTTA

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JUDGES OF THE HIGH COURT OF CALCUTTA DURING 1895.

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PRIVY COUNCIL.

PREENT:

Lords Watson, Macnaghten and Morris and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

1894 JULY 28. PRIVY COUNCIL. **22 C. 1 (P.C.)= 21 I.A. 170= 6 Sar. P.C.J. 514.**

CHATRAPAT SINGH DURGA (*Defendant-petitioner*) *v.* DWARKANATH GHOSE (*Decree-holder*). [28th July, 1894].

Execution of decree—Stay of execution—Order staying execution of a decree—Civil Procedure Code (*Act XIV of* 1882), s. 608, *sub-s.* (*c*) —*Privy Council, Practice of.*

The High Court, having, under s. 603, sub-s. (*a*) of the Civil Procedure Code, declared the admission of an appeal from their decree, refused an order, applied for under s. 608, sub-s. (*c*), for staying execution pending the appeal, the two Judges constituting the Court differing as to whether or not the case was such that the application should be granted. Their Lordships decided that the execution of the decree should be stayed pending the appeal. An order of Her Majesty in Council followed to that effect.

PETITION for a stay of execution of a decree (20th April 1892) of the High Court, which by order (5th July 1892) admitted an appeal to Her Majesty in Council from that decree, and by order (27th April 1894) refused a stay of execution. Also for special leave to appeal from the last order.

The petition stated that in 1887 Chunder Narain Singh, under whose will the respondents were his executors, sued Rai Lachmiput Singh in the Court of the Subordinate Judge of Rajmahal and obtained a decree on the 13th May 1887 as *shebait* of a temple for possession of a tract of alluvial land claimed by the temple and for mesne profits. On the defendant's appeal, the High [2] Court, having first, on the 4th September 1889, awarded one-fourth of the land, afterwards, on the 20th April 1892 in review, decreed the whole of the claim, 4,767 *bigas*, and Rs. 6,495, as mesne profits for three years. Pending the suit Rai Lachmiput died, and for him the petitioner was substituted; and Chunder Narain Singh having also died the respondents came on to the record.

1894 JULY 28. — PRIVY COUNCIL. — 22 C. 1 (P.C.)= 21 I.A. 170= 6 Sar. P.C.J. 514.

On the 5th July 1892, the High Court declared the admission of an appeal under s. 603. An order was then made in the Court of first instance for execution of the decree of 20th April 1892, whereupon the defendant applied under s. 608, sub-s. (*c*)of the Civil Procedure Code, to the High Court for an order staying execution, and obtained, on the 12th December 1893, an order for cause to be shown why an order to that effect should not be made upon security being given. The grounds were these: *first*, that the land might deteriorate, if mismanaged; *secondly*, that landmarks and boundaries might be caused to disappear, thus giving rise to disputes with proprietors of adjoining land; *thirdly*, that as the decree-holders were executors of one who was the *shebait* of the institution to which the property had been awarded, difficulties might arise with any successor in office as to a refund of mesne profits, accounts, and other matters.

The decree-holders having been heard on the 27th April 1894, NORRIS, J., the senior Judge of the Bench, was of opinion that there were no special circumstances in the case to warrant a stay of execution. In this his colleague, BANERJEE, J., did not concur, holding that, in regard to the position of the decree-holders applying for execution and to the kind of land, a *chur*, which was in dispute, this was a fit case for an order staying execution upon security being given. The adverse judgment of the senior Judge prevailed, and the order was refused.

The petition was for special leave to appeal from the order of the 27th April 1894, as well as for a stay of execution of the decree of the 20th April 1892. The application was *ex parte*.

Mr. *J. H. A. Branson*, in support of the petition, stated that it was made in its present form for leave to appeal from the order of the 27th April 1892 as well as for a stay of execution, because it had been understood that hitherto no stay of execution had [3] been granted here when the Court in India, admitting the appeal, had refused to stay execution; but a stay had been granted only when special leave to appeal had been obtained from their Lordships. A note on *Indur Kunwar* v. *Jaipal Kunwar* (1), in Wheeler's Privy Council Law, 446, related to this. He referred to the difference of opinion between the Judges below, contending that on the grounds taken before them they should have granted a stay in the discretion given them by s. 608, sub-s. (*c*).

Their Lordships were of opinion that, as the two Judges of the Court below had differed in opinion, their discretion had not been exercised, as they were empowered to exercise it, under s. 608 of the Civil Procedure Code, without there being occasion to grant special leave to appeal from the order of the 27th April 1894. The case was one in which a stay of execution should be ordered on this petition.

Petition granted.

The order of Her Majesty in Council followed, dated the 5th August 1894.

Solicitors for the petitioner: Messrs. *Barrow & Rogers*.

C. B.

(1) 15 C. 725=15 I.A. 127.

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APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

HAR NANDAN SAHAI (*Plaintiff*) v. BEHARI SINGH (*Defendant*).*
[6th June 1894.]

Appeal—Order granting review of judgment—Civil Procedure Code (*Act XIV of* 1882), s. 629.

No appeal lies from an order granting a review of judgment except as provided by s. 629 of the Civil Procedure Code. *Bombay and Persia Steam Navigation Co* v. *S. S.* "*Zuari*" (1) followed.

[F., 22 C. 984 (988); 14 Ind. Cas. 39; 62 P.R. 1895; Appl., 24 C. 878 (880); R., 24 P.L.R. 1902; D., 9 Ind. Cas. 320]

THE facts of this case, so far as they are material, are stated in the judgment of the lower appellate Court, which was as follows :—

[4] "This is an appeal from a decision and judgment of the Munsif, first Court, Chupra, passed in a suit brought by the plaintiff Har Nandan Sahai for the declaration of his right to a small piece of land that intervenes between his and the defendant-appellant's land. The suit was at first, on the 14th September 1891, dismissed upon the evidence that was before him. A review of his judgment was applied for, and it was granted. The parties were allowed to adduce fresh evidence and the suit has been decreed in plaintiff's favour. Hence the defendant appeals against the learned Munsif's order granting the review as well as against the subsequent decree passed in plaintiff's favour.

"The plaintiff's suit was at first dismissed under the following circumstances: The parties had their witnesses in attendance on the 9th September 1891, but the plaintiff made a special application relying solely on the defendant Behari Singh's testimony if he were to give evidence upon a particular form of oath. The defendant Behari Singh was not present in Court at the time. An application was made on his behalf, asking for time, and the 14th September 1891 was fixed for trial with a direction that witnesses should be produced on that day.

"On the 14th of September the defendant Behari Singh came with his witnesses, but Behari Singh declined to give evidence on the particular oath required of him. He however expressed willingness to give evidence on solemn affirmation. The plaintiff's pleader after that examined the defendant Behari Singh on administration of the usual solemn affirmation, who instead of proving the plaintiff's case supported his own. The Munsif then called upon the plaintiff's pleader to adduce any other evidence in the cause. But no such evidence being forthcoming, the suit was dismissed on the ground that the plaintiff failed to prove his own case.

"The plaintiff thereupon applied for a review of the judgment on four grounds :

"1. If the defendant had taken the special oath required of him, the plaintiff would not have the necessity of any other evidence, and it was for this reason the plaintiff had not given a *hazari* of his witnesses, . .

* Appeal from Appellate Decree No. 1853 of 1893, against the decree of Babu Krishna Nath Roy, Officiating Subordinate Judge of Sarun, dated the 26th of July 1893, reversing the decree of Babu Upendro Nath Bose, Munsif of Chupra, dated the 12th of July 1892.

(1) 12 B. 171.

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"2. That on the 9th September 1891 the defendant, not having been present when the special application for his examination was made, an application for time on his behalf agreeing to take the special oath was made, in consequence of which the 14th September was fixed for hearing, and that there was no clear order passed on the plaintiff to produce his witnesses on that day. But if there was any such order, the parties did not understand it. That it was for this reason the parties did not submit their *hazari* of witnesses on the 17th September 1891, and that the plaintiff's witness who was in attendance, believing that the defendant would take the special oath, disappeared.

"3. That the plaintiff understood that the defendant had no objection to [5] taking the special oath and wanted time only to appear on the 14th September 1891, and that the suit would be disposed of on such evidence; he did not think it worth while to attend the Court, and he, the plaintiff, who is a *mukhtear*, went away to Akwa to attend to his client's case, which was then being heard by the Deputy Magistrate while on tour, but he thought he would avail of the train that reaches at mid-day, which he could not do for want of time.

"4. That the defendant on the 14th September 1891 attended, but he did not object in writing to the special oath being administered on him. On his refusing to take the particular oath required of him, the plaintiff's pleader applied for time, when the Court wanted him to produce his witnesses, but the Court without giving heed to his prayer decided the case, and after passing judgment rejected his application for time.

"It should be mentioned here that the plaintiff, by an application of the 7th November 1891, withdrew the latter part of the objection and asked to strike off the words "after passing judgment" from the fourth para. of his objections.

"The defendant-appellant opposed the application and traversed all that the plaintiff stated.

"The learned Munsif, without taking any evidence of the truth or otherwise of the plaintiff's statements, admitted the review on the second ground, only observing: 'However as the plaintiff could not know before the 14th September 1891 whether the defendant would consent to swear specially, and as the plaintiff was not particularly ordered to produce his witnesses, I think that for the ends of justice this petition ought to be granted.'

"The defendant in his appeal contends that the learned Munsif's procedure is against the provisions of ss. 623 and 626 of the Civil Procedure Code, and his order granting the review should be set aside, and all the proceedings taken by him since the 7th November 1891 should be quashed.

"The plaintiff-respondent's pleader on the other hand objects to the defendant's raising the question on appeal, as he is debarred by s. 629 from taking up this question. His arguments are that that section provides 'an order of the Court for rejecting the application shall be final, but whenever such application is admitted, the admission may be objected to on the ground that it was (*a*) in contravention of the provision of s. 624, (*b*) in contravention of the provisions of s. 626, or (*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.'

"Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in any suit.

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" Section 626 says: 'If it appear to the Court that there is not sufficient ground for a review, it shall reject the application. If the Court be of opinion that the application for review should be granted, it shall grant [6] the same, and the Judge shall record with his own hand his reasons for such opinion : provided that (*a*) no such application shall be granted without previous notice to the opposite party, &c., (*b*) no such application shall be granted on the discovery of new matter or evidence,' &c., without strict proof of such allegation.

" Therefore he contends, as the present case does not come within the provisos, and the Munsif held there was sufficient ground for granting the review, and as the review was not granted in contravention of s. 626, the defendant has no right of appeal by s. 629, and in support of his contention he cites the ruling of the Bombay High Court in the *Bombay and Persia Steam Navigation Co.* v. *S. S. "Zuari"* (1).

"His Lordship, SARGENT, C.J., construes s. 626 as used in s. 629 to mean that there may be an appeal on the ground that the Court has granted the review without first coming to a conclusion that there was 'sufficient ground' or without notice of the application for review having been given to the opposite party or without strict proof of the allegation referred to in proviso (*b*). His Lordship continues : 'In the present case we understand that the learned Judge, who made the order, was of opinion that there was sufficient ground for review, and he accordingly granted the application. It is not contended that there has been any violation of the rules contained in the provisos to s. 626, and we must, therefore, hold that there is no appeal from the order.'

" This construction of s. 626 as used in s. 629 has been approved by our High Court in *Aubhoy Churn Mohunt* v. *Shamant Lochun Mohunt*(2).

" These two cases were decided on objections made at once by an appeal against the order granting the application for review, and not in any appeal against the final decree or order made in the suit. But we have authority under the old Procedure Code when the granting of a review was final to contest on appeal the order granting it. It is the case of *Prannath Bhadoory* v. *Sreekant Lahoory*.(3)

" In that case the Munsif dismissed a suit; afterwards he issued a rule calling upon the defendant to show cause why a review of judgment should not be granted. The defendant showed cause, but his objections were overruled; the review was granted. Both plaintiff and defendant adduced new evidence, and a decree was given for the plaintiff. On appeal the Subordinate Judge reversed this decision on the ground relied upon by the defendant in showing cause in the lower Court, namely, that the plaintiff had not established that with due diligence he could not have produced in the original trial the evidence upon which his application for review was based. That is to say, [7] the appellate Court went into the question whether there was due diligence wanting or not in producing in the original trial the fresh evidence upon which his application for review was based. Similarly in the present case the defendant asks to have it considered in appeal whether the learned Munsif's finding of 'sufficient reason' is sufficient or not, or in other words whether the interlocutory order granting the review was made on materials sufficient for coming to the same conclusion with the lower Court. I think I sitting in appeal on the decision of the first Court have a right to consider whether that order was correctly passed or not. The case of *Gopal Chandra Lahiri* v. *Solomon* (4) also supports this view.

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(1) 12 B. 171. (2) 16 C. 788. (3) 2 C.L.R. 257. (4) 13 C. 62.

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"The appellant's pleader says that the plaintiff did not show by any evidence or affidavit that he was misled by any order of the 9th September 1891. The order runs thus : 'That the plaintiff has filed an application calling on the defendants to give evidence and asking to decide the case accordingly. But the defendant is absent. An application for adjournment on the part of defendant so that he might attend has been made. Hence ordered that the case be postponed till 14th September 1891 for disposal. The defendant's pleader should produce the defendant on that day, and witnesses should be produced.' The context of the order leaves no room to doubt that the parties were ordered to produce their witnesses on the date so fixed. The Munsif says the plaintiff was not 'particularly' ordered to produce his witnesses. I do not understand why any party should be particularly mentioned in an order to produce his witnesses. The order is general, and sufficiently directs that the parties should come ready with their witnesses. If the plaintiff had misunderstood that order he should have come into the witness-box and supported that part of his case, but he did not do it, nor did he prove that part of his case by any affidavit. I therefore consider that the learned Munsif was in error in allowing the application for review, when his order does not interpret that construction put upon it in the application for review, and specially when the defendant objected to putting that meaning on that order.

"The lower Court considered the other grounds unfounded and I need not refer to them.

"As the order granting the review is erroneous, I do not think I should take into consideration the mass of evidence recorded and received after that order.

"The evidence that is on record previous to the granting of the plaintiff's application for a review of the Munsif's judgment does not support the Munsif's second finding. The appeal will, therefore, be decreed and the plaintiff's suit be dismissed with costs in both Courts."

On appeal from this decision to the High Court the only material ground was that no appeal lay from the Munsif's [8] order granting the review, and therefore the lower appellate Court had no jurisdiction to find that that order was erroneous.

Babu *Nalini Ranjan Chatterjee*, for the appellant.

Mr. *C. Gregory*, for the respondent.

The judgment of the Court (TREVELYAN and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

In this case the question arises whether an appeal lay from an order of the Munsif granting a review of judgment. We have heard the question argued out, and in our opinion the decision of a Bench of the Bombay High Court in *Bombay and Persia Steam Navigation Co.* v. *S.S.* "*Zuari*"(1), is expressly in point in this case. We see no circumstances distinguishing that case from the present one, and we see no reason for distinguishing it. If we had to decide the question ourselves we should decide it in exactly the same way. The reasons for the decision are fully given, and we entirely agree with them. In our opinion no appeal lay from the order of the Munsif granting the review. We think we ought to add also

(1) 12 B. 171.

that this question of granting the review was fully considered by the Munsif, and there were materials before him for granting the review.

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The case must go back to the lower appellate Court to decide the other questions arising in the appeal. Costs will abide the result.

J. V. W. *Case remanded.*

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APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

LALLA SHEO CHURN LAL AND ANOTHER (*Defendants*) v. RAMNANDAN DOBEY AND ANOTHER (*Plaintiffs*).* [8th August, 1894.]

Civil Procedure Code (Act XIV of 1882), *ss,* 102, 103—*Suit brought by next friend of minors and struck off for default of appearance—Gross negligence on the part of next friend—English rule of law—Law of equity and good conscience.*

[9] Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in s. 103 of the Civil Procedure Code to the institution of a fresh suit by such person when the disability has ceased.

Where a suit for certain property was brought on behalf of two minors by their next friend, and, owing to the gross want of care and diligence on the part of the next friend, the suit was struck off under s. 102 for default of appearance : *Held*, in a suit afterwards brought by the same plaintiffs on attaining their majority, that the suit was not barred by s.103 of the Code.

The English rule of law on this point as being the law of equity and good conscience was applied by the Court to this case, in the absence of any statutory provision.

[F., 14 Ind. Cas. 95 (97) ; 4 P.L.R. 1901 ; 21 Ind. Cas. 15 (17)=25 M.L.J. 379 (383) =14 M.L.T. 189 (192)=(1913) M.W.N. 690 (693) ; R., 19 B. 571 (577) ; 24 B. 547 (552) ; 3 C.L.J. 119 ; 6 C.L.J. 448 ; 14 Ind. Cas. 150=127 P.W.R. 1912 ; 16 Ind. Cas. 543 ; 10 O.C. 321 ; D., 5 Bom.L.R. 174 (176).]

THE property in dispute in this case, namely, a one anna four pie share of *mouza* Jagdispur, *pargana* Bal, originally belonged to one Senehi Ram, from whom it descended to his son Chatterdhari Lal, who mortgaged it in 1869 to Rung Lal Dobey, the uncle of the plaintiffs, with whom they lived as a joint family. Rung Lal Dobey foreclosed the mortgage and obtained possession and mutation of his name in 1872. He died in 1874, and on his death the property came to the plaintiffs as his heirs. They were then, however, minors, and also in 1880, when the defendants in the strength of an alleged *kobala* from Senehi Ram, dated in 1833, set up an adverse title, and applied under the Land Registration Act of 1876 for registration of their names as owners of the property, and on the 28th February 1880 the Collector upheld their sale-deed and allowed their names to be registered. Anoragi Koer, the widow of Rung Lal Dobey and aunt of the plaintiffs, thereupon sued on their behalf to establish their title to the property, but this suit was dismissed under s. 102 of the Civil Procedure Code, for non-appearance of the plaintiffs, on the 24th November 1880. Anoragi applied for a review, but the application was rejected, and she then appealed from the order dismissing the suit, but the

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* Appeal from Appellate Decree No. 857 of 1893 against the decree of Babu Anantaram Ghose, Subordinate Judge of Sarun, dated the 20th of January 1893, reversing the decree of Babu Jogendra Nath Chuckerbutty, Munsif of Chuprah, dated the 31st of August 1892.

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appeal was dismissed on 26th May 1881, and the defendants obtained a decree for the costs of all these proceedings, which they proceeded to execute against the plaintiffs, and the latter having then attained majority brought the present suit against the defendants to set aside the decree obtained against them in the former suit and **[10]** for a declaration of their right to, and confirmation of, their possession of the property.

There were various defences to the suit, but the only one material to this report was that the suit being on the same cause of action as the former one, was precluded by ss. 102 and 103 of the Civil Procedure Code.

The Munsif found that the causes of action in the two suits were identical, and that the plaintiffs were precluded from bringing the suit. The plaintiffs at the hearing raised contentions that Anoragi Koer was not their lawful guardian ; and that she acted with due care and diligence in the former suit, and they ought not to suffer for her laches ; but the Munsif decided both these contentions against them, and dismissed the suit.

The Subordinate Judge on appeal found that Anoragi Koer had been in the former suit the certificated guardian of the plaintiffs; but he held that the causes of action in the two suits were not identical, and that the former suit had miscarried owing to the gross want of care and diligence on the part of Anoragi Koer, which amounted to misconduct on her part, and referring to *Grish Chunder Mookerjee* v. *Miller* (1), and *Kesho Pershad* v. *Hirdoy Narain* (2), as authorities on the point, held that the plaintiffs were not bound by the decree in the former suit. He allowed the appeal and set aside the decree of the Munsif.

The defendants appealed to the High Court.

Babu *Umakali Mookerjee*, and Babu *Nalini Nath Sen*, for the appellants.

Babu *Rajendra Nath Bose*, for the respondents.

The judgment of the Court (TREVELYAN and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

The facts necessary for the determination of this appeal are as follows :—

It has been found as a fact by the lower appellate Court that the plaintiffs have a good title to the land in question, and that they and their predecessors in title have been in possession thereof since 1872.

[11] In 1880 a suit was brought on behalf of the present plaintiffs, who were then minors, by their aunt who described herself as their mother and next friend, and who had obtained a certificate to represent their estate under Act XL of 1858. That suit was against the present defendants and sought for confirmation of possession of one-anna out of the one-anna and four-pie share, which is in question in the present suit. On the 24th of November 1880, that suit was struck off by the Munsif for default of appearance, and on appeal the order of the Munsif was confirmed.

The lower Court of appeal in this case has found as a fact that the suit of 1880 miscarried, owing to gross want of care and diligence on the part of the next friend. He further finds "her neglect to prosecute the suit with due care was misconduct on her part." The plaintiffs having

(1) 3 C.L.R. 17.

(2) 6 C.L.R. 69.

attained majority have brought this suit for the purpose of obtaining a declaration that the decree in the other suit, and the proceedings thereunder, are inoperative against them, and also for a declaration of their right to the property.

They are met by the statutory bar contained in s. 103 of the Civil Procedure Code, which provides that, when a suit is wholly or partially dismissed under s. 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action.

The question, therefore, is whether gross negligence on the part of a next friend prevents the effect of this bar.

The statutory bar in s. 103 cannot have a greater effect than that provided by s. 13, or, in other words, an infant cannot be in a worse case where his next friend or guardian fraudulently or negligently omits to appear than where he appears, and fraudulently or negligently submits to a decree or otherwise prejudices the interest of the infants. The question, therefore, reduces itself to the question whether the negligence of a next friend prevents the operation of the law of *res judicata*.

According to the law, as administered in England, gross negligence as well as fraud prevents the operation of the bar.

In Macpherson on Infants, p. 386, we find the following: "An infant plaintiff, though thus favoured in the course of the suit, [12] is as much bound by a decree and by all the proceedings in a cause as a person of full age, and cannot, nor can his representatives, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of the Courts of Justice as much as any other transactions."

In Simpson on the Law of Infants, first edition, p. 475 (1), we find the following:—

"A decree may also be impeached where there has been gross negligence by the next friend in the conduct of the infant's case, or new matter discovered since the date of the decree."

In the case of *In re Hoghton* (2), Sir R. Malins, V. C., says :—

"The question which I have to decide is whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience. * * The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests."

From this it is clear that, according to the law as administered in England, the gross negligence of his next friend would entitle an infant to obtain the avoidance of proceedings undertaken on his behalf. We can see no reason why in this country an infant should be in a worse position. In cases outside Calcutta we are bound, in the absence of statutory provision, to apply rules of equity and good conscience. These rules cannot be more restricted than the rules of equity administered in England.

There is no authority in this country which could prevent us giving effect to the English rule.

We are pressed by the decision of a Bench of this Court in the case of *Eshan Chundra Safooi* v. *Nundamoni Dassee* (3). In that case there was no question either of fraud or of negligence. The [13] learned Judges

(1) 2nd Edition, p. 512. (2) L. R. 18 Eq. 573 (576). (3) 10 C. 357.

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expressed their opinion that the plaintiff might have relieved himself of fraud in one of three ways : *First*, by an application to the Court in the suit in which the withdrawal took place; *secondly*, by a regular suit to set aside the judgment founded upon the withdrawal; or, *thirdly*, by bringing a fresh suit for the same cause, and setting up the fraud as an answer to the statutory bar. As fraud and negligence are, in our opinion, on the same footing, the plaintiff has the same relief in each case. The only passages in the judgments in *Eshan Chundra Safooi's* case which can be said to conflict with the proposition of law which we are laying down, are where Sir R. Garth, C.J., says at p. 365 of the report: "It is difficult to see why a suit properly brought on behalf of any other person, who cannot act for himself, should be subject (so far as the present question is concerned) to other rules than those which are applicable to suits brought by parties in their own names;" and where Mr. Justice Cunningham says at p. 368: "I think we must take it to have been the law that where a minor is represented in the manner sanctioned by the law, and the person so representing him adopts a procedure to which particular consequences attach by the Code, then those consequences affect the minor."

These general propositions were, as appears from the rest of the judgments, subject to the exception of fraud. We have no doubt that, if the question of gross negligence had been in any way before them, their Lordships would have excepted that case also.

There is an authority which to some extent supports the view which we have taken in this case. In the case of *Koilash Chunder Sirkar* v. *Gooroo Churn Sirkar* (1) the Judges say this : "There remains the special appeal of Koilash Chunder, and on this point we think that the Judge was clearly wrong. He threw out a certain portion of the claim on the ground that it ought to have been included in the original suit brought by Goluck Monee; and that as it was not so included, Koilash, the son, was barred by s. 7 of Act VIII of 1859, from preferring it. On this we observe that when Goluck Monee instituted the suit on behalf of Koilash, the latter was a minor, and there is no law which prevents [14] a minor when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute. If this were the law no minor would be safe, and we do not see how Koilash, when he attained majority, was debarred from claiming, and that in the suit originally instituted by his guardian, such property as that guardian had omitted in the schedule of the plaint."

Section 7 of Act VIII of 1859 corresponds with the first part of s. 43 of the present Code, and is as much a statutory bar as is s. 103; so if negligence gets rid of the statutory bar under s. 43, it equally gets rid of the one imposed by s. 103.

In our opinion, the view of the Court below is right. We dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

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(1) 3 W. R. 46.

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APPEL-LATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

NARAYAN COOMARI DEBI (*Defendant*), *Petitioner v.* SHAJANI KANTA CHATTERJEE (*Plaintiff*), *Opposite-Party.** [17th August, 1894.]

Executor—Contract—Consideration—Gratuitous contract—Contract to pay remuneration to executor for performance of his duties—Remuneration not coming out of assets of estate—Administrator General's Act (*II of* 1874), *s.* 56—*Illegal contract as being opposed to public policy—Contract Act* (*IX of* 1872), *s.* 23—*Executors, Position and rights of.*

The defendant's brother appointed as executrix and executors of his will his wife *K.*, together with the plaintiff and another, and the plaintiff being unwilling to undertake the duties of executor without remuneration, *K.* offered him, and he accepted a sum of Rs. 125 a month for acting as executor; but before any formal agreement was entered into the defendant's *dewan* on her behalf proposed to the plaintiff that he should accept a *perwana* for Rs. 125 a month from the defendant instead of from *K*, to which the plaintiff agreed, and he accordingly received from the defendant a *perwana* in which she agreed to pay him from her own pocket the above sum monthly as long as he continued to perform the duties of executors of the estate of her brother, in which she was interested. In pursuance of this agreement the plaintiff, in conjunction with the other executor, took out probate of the will, and the stipulated remuneration was paid for some time and then ceased. In a suit for his salary for the portion of the time during [15] which he had acted as executor and had not been paid: *Held*, there was good consideration for the agreement. Such an agreement, moreover, was not unlawful by reason of s. 56 of the Administrator-General's Act (II of 1874), the words "receive and retain" in that section referring to the receipt or retention by an executor or administrator of commission or agency charges from the assets of the estate and not to remuneration paid to him by a third person. *Held* also, that the agreemont was not void under s. 23 of the Contract Act as being illegal or contrary to public policy, and a suit upon it was under the circumstances maintainable.

THE facts of this case which was tried by the Subordinate Judge, in the exercise of his powers as Small Cause Court Judge, are stated in his judgment which was as follows:—

"This is a suit for recovery of Rs. 375, being the amount due to the plaintiff as allowance for the months of Aghran, Pous and Magh of the current year (1300) (November, December, 1893 and January, 1894) which it is alleged the defendant agreed to pay the plaintiff at the rate of Rs. 125 per mensem, according to a *perwana* which was addressed to the plaintiff by her with her seal, dated in Magh 1299 (January 1893)

"The facts of the case are that Lalla Bangsha Gopal Nanda, who was the brother of the defendant, died in Pous 1299 (December 1892), after having made a will of his property on the 15th Kartick 1298 (31st October 1891), in which among other persons the plaintiff was named as an executor. The plaintiff, who is a pleader of the District Court here, having given out that he would not act as executor unless he received some remuneration for his services as executor, Kanchan Dai, who was the widow of Lalla Bangsha Gopal and one of the executors under the will, offered to pay the plaintiff a remuneration of Rs. 125 a month out of her own pocket if the plaintiff would accept the office of executor. The plaintiff agreed to this sum, but before any formal document was executed by Kanchan Dai binding herself to pay this sum in favour of the plaintiff, the plaintiff was asked if he would accept a *perwana* for this sum of Rs. 125 from the defendant

* Civil Rule No. 895 of 1894.

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instead of from Kanchan Dai. The plaintiff consented, and the *perwana* alluded to above was received by the plaintiff on the 15th Magh 1299 (27th January 1893) from the defendant, by which she undertook to remunerate the plaintiff at the rate of Rs. 125 for his acting as executor from her own pocket in the interest of the estate of her deceased brother. That this *perwana* was granted by the defendant cannot admit of a doubt, regard being had to all the circumstances and probabilities of the case. A notice was given to the defendant with the summons according to s. 128 of the Civil Procedure Code, in which she was asked if she would admit or deny the document. But this notice was not responded to, and then in the written statement which was filed by her in this case in answer to the plaintiff's case all that was pleaded on her behalf was, that there was no **[16]** valid contract by the defendant under the *perwana* mentioned above, without either formally admitting or expressly denying this document. That the defendant knew what she was about in agreeing to grant the plaintiff a monthly remuneration of Rs. 125 for his acceptance of the office of executor would appear from the personal communication which the plaintiff had with the defendant subsequent to this *perwana*. Then she has not given her evidence in this case. It is also a fact that up to Kartick last allowance at the rate agreed upon was received by the plaintiff from the defendant as evidenced by the receipt book produced by the defendant in this case at the instance of the plaintiff.

"The main contention on the part of the defendant in this case is, that the plaintiff is not entitled to the relief asked for on the basis of the document propounded by him, in that it does not disclose any consideration, as she is not supposed to derive any personal benefit as a consequence of the agreement. For my part I am unable to accept this argument as valid. It is clear, both from the document alluded to above as well as from the evidence of the plaintiffs which stands wholly unrebutted, that the inducement which led the plaintiff to take upon himself the responsibility of the office of executor was the promise on the part of the defendant by that *perwana* to grant him a monthly sum of Rs. 125 if he accepted the executorship to the estate of her deceased brother, in the good management of which she was interested. The plaintiff states that he would have refused to act as executor if this allowance had not been assured him. After having had this assurance from the defendant under the *perwana* alluded to, the plaintiff applied with the other executors on the 28th January 1893 for probate of the will. I think there was a lawful consideration for the agreement, and it is therefore binding on the defendant (*vide* the definition of "consideration" as set forth in the Contract Act, and in Addison on Contracts, p. 2, 9th edition). I am not prepared to say that the contract was gratuitous and a *nudum pactum*.

"The question whether this contract is binding on the defendant for ever, and whether it can be lawfully rescinded by her, does not arise in this case. It is not correct to say that the negotiation which the plaintiff had had at first with Kanchan Dai about his remuneration, before the defendant came in and offered to pay him the said allowance on her own behalf, had ripened into a binding contract, as nothing tangible in the shape of a document was offered by her to the plaintiff.

"I would decree this suit to the plaintiff with costs in all for Rs. 341-6 annas."

The defendant thereupon petitioned the High Court to send for the record in the case, and submitted that the decision of the Court below should be set aside mainly on the following grounds :—

[17] That the Court below ought to have held that the alleged contract was gratuitous and without consideration; that upon the plaintiff's own case, and upon the evidence adduced in the case, he having looked upon Kanchan Dai as the real person liable for the remuneration, and having actually received an instalment of the remuneration from Kanchan Dai, the Court below ought to have held that the defendant was not liable to the plaintiff, and that the plaintiff's remedy, if any, was against Kanchan Dai: that the Court below ought to have held that the defendant was not legally liable to pay the sum claimed, and that the claim of the plaintiff was illegal and prohibited under s 56, Act II of 1874; that the Court below ought to have held that there was no valid contract under the *sunnud* relied upon by the plaintiff, and the defendant was not personally liable to the plaintiff under the *sunnud*; and that upon the facts admitted or proved in the case, the Court below ought to have dismissed the suit as against the defendant.

The High Court granted a rule to show cause why the judgment should not be set aside.

The Advocate-General (Sir *Charles Paul*) and Babu *Karuna Sindhu Mookerjee* in support of the rule.

Mr. *W. C. Bonnerjee* and Babu *Hara Persaud Chatterjee* showed cause.

The arguments and cases cited are sufficiently stated in the judgment of the Court (GHOSE and GORDON, JJ). which was as follows :—

JUDGMENT.

The petitioner, who obtained this rule, is the Maharani of Burdwan, and the opposite party, Shajani Kanta Chatterjee, is a pleader practising in the District Court at that Station. The facts are shortly as follows: Lalla Bangsha Gopal Nanda, the Maharani's brother, died in Pous 1299, leaving a will in which he appointed as his executors his wife Kanchan Dai, Jugut Bandhu Mitter and Shajani Kanta Chatterjee. Shajani Kanta being unwilling to act as executor unless he received some remuneration for his services, Kanchan Dai offered him, and he accepted, a sum of Rs. 125 a month as remuneration for undertaking the duties of executor. Before, however, any formal agreement could be entered into, the Maharani's *Dewan* proposed [18] to Shajani Kanta that he should accept a *perwana* for Rs. 125 a month from the lady instead of from Kanchan Dai. Shajani Kanta agreed to this, and accordingly on the 15th Magh 1299 (27th January 1893) he received a *perwana* from the Maharani, in which she undertook to pay him monthly Rs. 125 so long as he continued to perform the duties of executor to the estate of her late brother. In pursuance of this agreement, Shajani Kanta on the 16th Magh applied jointly with his co-executor forand obtained probate of the will of Lalla Bangsha Gopal Nanda, and he continued to receive from the Maharani the stipulated remuneration up to Kartick 1,300, but from that month the payment ceased. Shajani Kanta accordingly sued the Maharani in the Small Cause Court of Burdwan to recover Rs. 375 on account of his salary for the months of Aghran, Pous and Magh of 1300, and the learned Judge of that Court decreed his claim. The Maharani then moved this Court, and a rule was issued on the plaintiff to show cause why, for reasons stated in the petition, the judgment should not be set aside.

The rule has been argued before us by the learned Advocate-General for the Maharani and by Mr. Bonnerjee for the opposite party.

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The first point urged by the learned Advocate-General was, that the alleged contract was gratuitious and without consideration. We are however unable to accept this view. Reading the *perwana* and the plaintiff's evidence together, it seems to us clear that there was consideration for the alleged contract. The Maharani was desirous that the estate of her late brother should be administered, and accordingly with this object she promised, in the *perwana* referred to, to pay the plaintiff a monthly sum of Rs. 125 as remuneration so long as he continued to perform the duties of executor. The plaintiff, who was not legally bound to accept the office of executor, in accordance with the desire of the Maharani as conveyed in her *perwana*, applied for probate as executor, and having obtained probate, he performed the duties of executor, and for some months received the stipulated remuneration for the Maharani. There was thus, we think, a clear consideration for the alleged contract [see Indian Contract Act, s. 2 (*d*), Addison on Contracts **[19]** p. 2, 9th Edition, and Pollock on Contracts, 5th Edition, p. 176.]

The second ground taken before us is, that under s. 23 of the Contract Act, the consideration of the alleged agreement is unlawful, because such an agreement is positively forbidden by law, or is of such a nature that if permitted it would defeat the provisions of the law. The law relied upon is s. 56 of Act II of 1874, the Administrator-General's Act, which provides as follows: "No person other than the Administrator-General acting officially shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration or letters *ad colligenda bona*, which have been or shall be granted by any Court of competent jurisdiction within the meaning of sections one hundred and eighty-seven and one hundred and ninety of the Indian Succession Act, 1865."

The learned Advocate-General contends that the word "receive" in this section means receive from any body and not merely from the assets of the estate, and that therefore in the present case the plaintiff is prohibited by law from receiving from the Maharani any remuneration whatsoever for the performance of the duties of executor. We are however not prepared to ascribe to the word "receive" in this section this wide and general meaning. Having regard to the scope and object of the Act, as well as to the terms of the section, it seems to us that the words "receive and retain" bear a more restricted meaning, and that they refer rather to the receipt or retention by an executor or administrator of commission or agency charges from the assets of the estate than from any third person; and in this view we think s. 56 does not apply to the present case.

The third and last point which has been pressed upon us is that the consideration or object of the alleged contract is unlawful, because such a contract is opposed to public policy, in other words, that it is opposed to public policy, not only to permit an executor to receive any allowance or remuneration for his services from the estate in respect of which he is acting as executor, but also to permit him to receive under any circumstances remuneration for such service from any person whatsoever. No doubt the authorities **[20]** cited before us see Williams on Executors, Book II, Part IV, p. 1860 Edition 1879; the case of *Robinson* v. *Pett* (1), of *Scattergood* v. *Harrison* (2), and the case of *Joygopal Bysack* v. *Roma Nath Bysack* (3)], go to show that an executor's office should be voluntary and

(1) 3 P. Wms. 249. (2) Mosely 130. (3) Fulton 113.

gratuitous, and that as a general rule, an executor or administrator is entitled to no allowance at law or in equity for personal trouble and loss of time in the execution of his duties. In one English case, however, to which our attention has been drawn, *viz.*, the case of *Chetham* v. *Audley*(1) the Lord Chancellor allowed an executor in India passing his accounts in England commission upon receipts or payments according to the practice then prevailing in India. The leading English cases bearing on the subject are that of *Robinson* v. *Pett* (cited above), and the cases referred to therein, and the principle which appears to underlie these decisions is that bargains which secure remuneration to the executor out of the estate itself ought to be discouraged as tending to dissipate the property.

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This principle has, however, no application to the present case.

It has however been strongly contended before us that the present contract is against public policy, because it creates an interest at variance with a duty [see case of *Egerton* v. *Earl Brownlow* (2)], that is to say, if the plaintiff be remunerated for his services there will be an inducement for him to neglect his duties and to prolong the administration instead of acting with care and diligence. We think that there is much force in this contention, but at the same time, although an agreement of this character may appear to some extent for the above reason to be opposed to public policy, we are not prepared to hold that such an agreement is necessarily unlawful. We think it should be borne in mind that, if a sole executor, or where there is more than one, all the executors, renounced, the estate of the testator might go unadministered unless the executor or executors undertook to accept office on receipt of remuneration from a third person, and it is quite possible that more public mischief and inconvenience might **[21]** be occasioned by the estate remaining unadministered than by rewarding an executor for administering it. In the present case it seems to be quite clear upon the evidence that Shajani Kanta would not have taken upon himself the duty of executor unless he was remunerated, and we are not prepared to say that, under the circumstances, the agreement entered into between him and the Maharani was unlawful. On the whole, we think that the decree of the Judge of the Small Cause Court ought not to be interfered with, and accordingly the rule will be discharged with costs.

J. V. W. *Rule discharged.*

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22 C. 21.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

NIM CHAND BABOO AND OTHERS (*Plaintiffs*) *v.* JAGABUNDHU GHOSE (*Defendant.*)* [20th July, 1894.]

Limitation Act, 1877, arts. 57, 120—Suit on pledge of moveable property—Prayers in plaint both for personal decree, and for right to enforce charge against property pledged.

A suit on a pledge of certain moveable property, made in respect of a loan of money on the 10th February 1887, was instituted on the 14th December 1891.

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* Appeal from Appellate Decree No. 352 of 1893 against the decree of J. Kelleher, Esq., District Judge of Burdwan, dated the 25th of February 1893, reversing the decree of Babu Rajendra Kumar Bose, Subordinate Judge of that District, dated the 1st of March 1892.

(1) 4 Vesey. 72. (2) 4 H.L.C. 1—250.

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The plaint prayed for a decree for the money lent against the defendant personally, and also that the charge might be enforced against the article pledged. *Held* that, so far as the prayer for a personal decree was concerned, the suit was governed by art. 57 of sch. II of the Limitation Act, and was barred; but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell, not within that article but within art. 120 of the same schedule and was therefore not barred.

[F., 17 A. 284 (286) = 15 A.W.N. 46; 27 M. 528 = 13 M.L.J. 445; 1 L.B.R. 154 (155).]

IN this case the defendant on 29th Magh 1293 (10th February 1887) borrowed from the plaintiffs the sum of Rs. 825, at the same time pledging to them certain ornaments, a list of which was written out, and at the foot a memorandum was made, "I take a loan of Rs. 825 on the pledge of these articles; I will pay interest on this at the rate of one rupee per cent. per mensem," and signed by the defendant. The plaintiffs alleged that at the time [22] the loan was made there was a verbal promise by the defendant to repay it in Aghran 1295 (November-December 1888), but this was denied by the defendant.

The suit was instituted on the 14th December 1891 for the sum of Rs. 1,315 then due, the plaint praying—(1) "that the Court may be pleased to award a decree for the said sum of Rs. 1,315, together with costs and interest from the date of the institution of the suit until realization; (2) that the Court may be pleased to award a decree for realization of the decretal amount together with interest until realization and costs of the suit from the said pledged ornaments, and by sale of the other properties belonging to the defendants." The only material defence was that the suit was barred by the law of limitation.

The Subordinate Judge found that the verbal agreement alleged by the plaintiffs was proved, and held that the suit (which he considered was governed by art. 120 of sch. II of the Limitation Act) was not barred.

The Judge on appeal found that the alleged verbal agreement was not sufficiently made out. As to the plea of limitation he observed as follows:—

"Then comes the question as to the period of limitation applicable. Appellants' pleader contends that it is three years under art. 57, sch. II of the Limitation Act, while respondent's pleader maintains that the case falls under art. 120 of the same schedule, giving a period of six years. His argument is that the suit was something more than one for money lent under art. 57. He says it was really a suit to enforce payment of money charged upon moveable property, for which no period of limitation is provided elsewhere in the schedule, and that art. 120 therefore applies; that such a suit, with respect to immoveable property, is provided for by art. 132, and that it could not have been the intention of the Legislature to make no provision for a similar suit with respect to moveables. The pleader also referred to s. 176 of the Contract Act. It appears to me that the suit was one for money lent, and that the period of limitation is that prescribed by art. 57, namely, three years from date of loan. The only authority on the point is a decision of *Vitla Kamti* v. *Kalekara* (1). Though the decision is not precisely in point, the reasoning would apply to the facts of the present case. I hold, therefore, that the suit was barred by limitation. The appeal will be allowed and plaintiffs' claim dismissed with costs of both Courts and interest at 6 per cent. Respondent's pleader contends [23] that his client should at least be allowed to retain the sale proceeds of the ornaments, if not as his own, at least by way of

(1) 11 M. 153.

pledge in substitution of the ornaments. The obvious answer to that is that the pledge was put an end to by the sale of the ornaments on respondent's own application. Another answer is that the pledge was extinguished by limitation of the debt, for the security of which it was created. I hold that the respondent must repay the sale proceeds of the ornaments."

The plaintiffs appealed from this decision mainly on the ground of limitation.

Mr. *Jackson*, Dr. *Rash Behari Ghose*, and Babu *Taruck Nath Sen*, for the appellants.

Dr. *Trailakhya Nath Mitter* and Babu *Nalini Ranjan Chatterjee*, for the respondent.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit upon a pledge of certain moveable property. The pledge in question was made on the 29th Magh 1293, corresponding to the 10th February 1887.

The suit was instituted on the 14th December 1891, that is to say, within six years, but beyond three years, from the date of the pledge. The lower appellate Court has dismissed the suit upon the ground that it is barred under art. 57 of the second schedule of the Limitation Act ; and the main question that we have to determine in this appeal is whether the case is governed by art. 57 or art. 120 of the Limitation Act.

So far as the plaint prays for a decree for the money lent against the defendant personally, we are of opinion that it is barred under art. 57. That article runs as follows : "For money payable for money lent : three years from the time that the loan is made ;" and it seems to us that so far as the claim is for recovery of the money against the defendant, it falls under that article. But we are not prepared to agree with the lower appellate Court in holding that so far as the plaintiff asks to enforce his charge against the article pledged, the case falls within the said article.

There can be no doubt that when moveable property is pledged to a person for money lent, he acquires a special property therein : **[24]** he has a charge upon it for the satisfaction of the loan advanced, and he is entitled, under s. 176 of the Contract Act, either to bring a suit against the owner upon the debt or promise, retaining the goods pledged as collateral security, or he may sell the things pledged upon giving reasonable notice of the sale. And when he brings a suit for the purpose of a declaration of his right to sell the article pledged for the satisfaction of his claim, the suit is one to enforce his charge upon the said articles.

It is, we believe, now well settled that when a mortgagee of immoveable property brings a suit to recover the money advanced by sale of the property pledged, it is a suit to enforce his charge upon the said property ; and we should think, by analogy, the claim of a pawnee for a similar relief in respect of moveable property is a suit to enforce his charge upon that property.

In this view of the matter it seems to us that the case does not fall within art. 57 of the Limitation Act, and there being no other article in the said Act applicable to it, we should think that it falls within art. 120 which provides for six years limitation.

The view that we adopt is one which we find was accepted by the Punjab High Court in the case of *Dowlath Ram* v. *Jewan Mal* (see

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Mr. Rivaz's edition of the Indian Limitation Act, 2nd Edition, p, 154, as also Branson's Digest, p. 219).

We ought here to mention that the learned Judge of the Court below, in support of his view, has referred to the case of *Vitla Kamti* v. *Kalekara*(1). That was a suit upon a bond whereby certain moveable property in the possession of the debtor was pledged as security, and the question that was discussed was whether art. 80 or art. 120 of the Limitation Act was applicable, and the learned Judges held that, so fas as the suit was to recover a debt due under the bond, it was governed by art. 80, and that "the power to bring moveable property to sale is an incident in the nature of an accessory to the right to recover the debt, and if that right becomes incapable of being enforced owing to the lapse of three years, the power to sell the security must likewise cease to be capable of being exercised."

We are, however, unable to agree in this view, and in this [25] connection we might refer to the observations of Sir Barnes Peacock in the case of *Surwan Hossain Khan* v. *Golam Mahomed* (2), decided by a Full Bench of this Court, where that eminent Judge (see p. 173 of the Report) in referring to a similar argument that was put forward in respect of a suit to enforce a lien upon immoveable property disapproved of that view, and he observed as follows: "If land is mortgaged as security for a loan, in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to us that the charge upon the land created an equitable interest upon the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest."

In the view which we have just expressed the other questions that have been discussed before us do not arise.

The result is that this appeal will be allowed so far as the plaintiff seeks to enforce his charge against the articles pledged. Each party will bear his own costs.

J. V. W. *Appeal allowed in part.*

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22 C. 25.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

TOKHAN SINGH *alias* ROOP NARAIN SINGH AND OTHERS (*Decree-holders*) *v.* UDWANT SINGH (*Judgment-debtor.*)*
[16th August, 1894.]

Surety—Enforcement of security—Surety for amount of decree pending appeal—Execution of decree—Separate suit—Civil Procedure Code, ss. 244, 253.

Where a surety has become security for the appellant in an appellate Court, under s. 545 of the Code of Civil Procedure, the security bond cannot be enforced in execution of the decree under s. 253, but a separate suit must be brought against the surety. *Kali Charan Singh* v. *Bal Gobind Singh* (3) referred to.

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* Appeal from Appellate Order No. 287 of 1893, against the order of H. Holmwood, Esq., Officiating Judge of Bhagulpore, dated the 1st of July 1893, reversing the order of Babu Parbutty Kumar Mitter, Subordinate Judge of Monghyr, dated the 20th of May 1893.

(1) 11 M. 153. (2) 9 W.R. 171=B.L.R. Sup. Vol. 879. (3) 15 C. 497.

[Diss., 17 A. 99 (102)=15 A.W.N. 19; 14 Bur. L.R. 170=4 L.B.R. 197 (198); 109 P. R. 1906=1 P.L.R. 1907; F., 23 C. 212 (216, 217); R., 13 C.P.L.R. 104 (106); Cons., 25 B. 409 (414).]

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[26] IN this case execution of a decree was applied for against the surety who had become security for the appellant under s. 545 of the Code in an appeal which was pending against the decree. The surety took the objection that he should be proceeded against by suit and not summarily in execution of the decree.

In overruling this objection, the Subordinate Judge said :—

"The properties of the surety may be sold in execution of the decree under s. 253 of the Civil Procedure Code without a fresh suit being brought against the surety. In this case the surety undertakes to pay the amount of the decree, while an appeal was pending, and his position is the same as that of a person becoming surety before the making of a decree in an original suit. The objections of the surety are overruled."

On appeal the Judge reversed this decision in the following judgment :—

"In this case a surety has been made responsible for the decretal money in a suit in which an appeal is pending. The security was taken after the decree, and he appeals. On reading s. 253 of the Civil Procedure Code, I could have no doubt, on the plain meaning of words, that the surety cannot be rendered liable in execution. It is, however, argued that the rulings in *Balaji* v. *Ramasami* (1), and also in *Radha Persad Singh* v. *Phuljuri Koer* (2), apply to proceedings after the appellate decree, and that this case, which has not advanced to an appellate decree, is governed by the judgment in *Bans Bahadur Singh* v. *Chunni Bai* (3). I would observe that this was also a case which had reached its final stage in the Privy Council, and the principle to be decided is the same in all the cases, *viz.*, do the words in s. 253 bear their plain meaning—'before the passing of a decree in an original suit,' *i.e.*, before the passing of any decree, thus excluding all but the decree of the Court of first instance; or must we, in the words of Straight, J., 'wander afield to try and reconcile suggested inconsistencies in the Act, or drop out a sentence introduced intentionally,' &c. In face of the dissentient judgments of Straight and Spankie, JJ., I do not think I should follow the Allahabad ruling, when the Calcutta ruling in *Radha Persad Singh* v. *Phuljuri Koer* (2) lays down the law on the subject as unquestioned and incontrovertible; for Field, J., says: 'Now it is clear that the person against whom execution is sought did not become surety before the passing of the decree in the original suit, and therefore the express language of s. 253 is not applicable.' He then goes on to consider if any other section is applicable, and finds there is none. The Munsif's order is in this case under [27] s. 253, and even if I had to go beyond it, and see if there is any other way of rendering the surety liable in execution, the Calcutta ruling settles that point for me. As regards the other point, that the surety having deposited the decretal money, the decree is satisfied, and there is no appeal to me under s. 244 of the Civil Procedure Code, I find that the Munsif made the deposit of the decretal money a condition of admitting the surety's objections. It was in deposit only when the objection was decided and the execution proceedings cannot have determined. The appeal is decreed."

(1) 7 M. 284. (2) 12 C. 402. (3) 2 A. 604.

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From this decision the decree-holders appealed to the High Court, the only ground material to this report being that the Judge was in error in holding that the decree-holder's remedy against the surety was by separate suit and not by execution of the decree.

Babu *Karuna Sindhu Mukerjee*, for the appellants.

Babu *Jogesh Chunder Roy*, for the respondent.

The following cases were cited: *Balaji* v. *Ramasami* (1); *Bans Bahadur Singh* v. *Chunni Bai* (2); *Radha Persad Singh* v. *Phuljuri Koer* (3); *Kali Charan Singh* v. *Balgobind Singh* (4); *Venapa Naik* v. *Baslingapa* (5); and *Thirumalai* v. *Ramayyar* (6).

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

The question raised in this appeal is whether the provisions of s. 253 of the Code of Civil Procedure are applicable to a surety who becomes security for an appellant in the appellate Court under s. 545 of the Code, or, in other words, whether the security bond can be enforced against the surety in execution of the decree of the appellate Court, without a separate suit being brought against him.

The learned vakil for the appellants has referred us to several cases as bearing upon the question. It is sufficient for us to refer only to the case of *Kali Charan Singh* v. *Balgobind Singh* (4), decided by this Court, where a question very similar to that which is raised in this case was fully discussed and decided.

[28] We think that the Court below has come to a right conclusion in holding that the money covered by the decree cannot be realized from the surety in execution of the decree, and accordingly the appeal will be dismissed. We make no order as to costs in this appeal.

J. V. W. *Appeal dismissed.*

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22 C. 28.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

BAMA SUNDARI DASI (*Plaintiff*) *v.* ADHAR CHUNDER SARKAR AND ANOTHER (*Defendants*).* [24th July, 1894.]

Voluntary payment—Contract Act (*IX of* 1872), *ss.* 69, 70—*Money paid for benefit of another—Money paid to protect property from sale in execution of decree for arrears of rent.*

Certain immoveable property was inherited by S., the mother of the plaintiff, from her husband, and during her tenure of it she alienated it by deed of sale to the defendants. S. died in April 1890, and the estate devolved upon the plaintiff, an only daughter (there being no male issue). In 1890 the property in possession of the defendants was, at the suit of a person who was the landlord, ordered to be sold together with other properties of the defendants for arrears of rent, due in the lifetime of S. and to prevent the sale the plaintiff paid the amount of the decree. In a suit for possession of the property and

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* Appeal from Appellate Decree No. 1248 of 1893, against the decree of H. Peterson, Esq., District Judge of Burdwan, dated the 3rd of June 1893, affirming the decree of Babu Janoki Nath Dutta, Munsif of Burdwan, dated the 27th of June 1893.

(1) 7 M. 284. (2) 2 A. 604. (3) 12 C. 402.
(4) 15 C. 497 (5) 12 B. 411. (6) 13 M. 1.

for a refund of the sum paid by the plaintiff to stop the sale, the defendants claimed an absolute interest in the property, but the Courts below found that the alienations by S. to the defendants were not made for legal necessity and were therefore invalid. *Held*, that the payment made by the plaintiff was not a voluntary payment, but was one which she was entitled to recover from the defendants. It being a question at the time whether the property belonged to the plaintiff or to the defendants, the payment to stop the sale was one in which the plaintiff was interested sufficiently to bring the case within s. 69 of the Contract Act. Section 70 was also applicable as the payment relieved the defendants from liability to their landlord, and was made for the defendants, and not gratuitously, and the defendants enjoyed the benefit of such payment. The principles laid down in the cases of *Duli Chand* v. *Ramkishen Singh*(1), *Smith* v. *Dinonath Mookerjee* (2) and *Jugdeo Narain Singh* v. *Raja Singh*(3) were held to govern this case.

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[Appr., 28 A. 563 (570)=3 A.L.J. 372=A.W.N. (1906) 114 ; R., 11 Ind. Cas. 155 ; D., 13 C.L.J. 646 (648)=15 C.W.N. 332=9 Ind. Cas. 219 ; 9 Ind. Cas. 615 ; 7 O.C. 146 (149); 19 C.L.J. 72 (75)=18 C.W.N. 778=21 Ind. Cas. 207 (209).]

[29] THIS was a suit for possession of certain land, which belonged to the plaintiff's father Nanda Kishore Mitter, who died in 1835. He left a widow and three daughters but no male issue, and on his death his widow Sudhamoyi Dasi, the plaintiff's mother, inherited his property. She died on 12th Baisakh 1297 (24th April 1890), and the plaintiff's two sisters having predeceased their mother, the plaintiff became sole heir to her father's property. During Sudhamoyi's tenure of the property she had alienated portions of it to the defendants under *kobalas*, and they had become purchasers of some of it at a sale in execution of a decree against her. As to this, however, the plaintiff submitted that the alienations had not been made for legal necessity according to Hindu law, and the sale was only of Sudhamoyi's interest in the property, and in either case the alienations were only valid for her lifetime.

The plaintiff also sued for a sum of Rs. 78-3 which she had deposited in a rent suit brought against the defendants, in which the property she now claimed was threatened with sale. It appeared that a suit had been brought in 1890 by one Kailash Chunder Shamanta, under whom the defendants were tenants, against the defendants for arrears of rent, and in execution of a decree obtained in that suit the property which the plaintiff now claimed, together with other property of the defendants, was ordered to be sold, and this coming to the notice of the plaintiff, she had paid the above sum to save the property from sale, and now claimed a refund of it.

The defendants claimed the property in suit as their own ; and as to the sum of which a refund was claimed, they submitted it was a voluntary payment, for which the plaintiff had no right of suit against them.

Both the lower Courts found that the alienations made by Sudhamoyi were made without legal necessity, and held good at best only for her lifetime. The only point material to the report was whether the payment by the plaintiff was a voluntary payment or not, and this formed the only ground of appeal to the High Court, the lower Courts both holding that it was a voluntary payment.

[30] On the appeal to the High Court, appeared—

Babu *Kishori Lall Gossami*, for the appellant.

Babu *Jaggat Chunder Banerjee*, for the respondents.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

(1) 7 C. 648=8 I.A. 93. (2) 12 C. 213. (3) 15 C. 656.

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JUDGMENT.

The sole question that arises in this appeal is whether a certain payment made by the plaintiff in satisfaction of a decree obtained by the landlord against the defendants was a voluntary payment.

The facts out of which this question arises are shortly these: A certain property, among others, belonged to one Nanda Kishore Mitter. He died leaving his widow Sudhamoyi Dasi and a daughter, the present plaintiff. Sudhamoyi Dasi, upon the death of Nanda Kishore, succeeded to the estate, and while she was in possession thereof, she sold the said property to the defendants. In Baisakh 1297 (B. S.) Sudhamoyi Dasi died, and the plaintiff inherited the estate as heiress of her father. In the year 1890, that is to say, in the same year that the plaintiff's mother died, a decree was obtained by the landlord against the defendants for the rent of the said property (it being a tenure held under him) and another property. The rent that was claimed, and the decree obtained by the landlord, were on account of a period antecedent to the time when the estate, upon the death of Sudhamoyi Dasi, devolved on the plaintiff. The landlord took out execution of this decree and attached the property in question and lotted it up for sale for satisfaction of his demand, which demand, as already mentioned, related, not only to the property in question, but also to the other property that was held by the defendants under the landlord. The plaintiff, apparently, in order to save this property from sale, paid up the decree, and she subsequently brought the present suit to recover from the defendants the amount so paid by her. The plaintiff claimed for other reliefs, one of them being the recovery of the property claimed by the defendant under his purchase from the plaintiff's mother; but the only point with which we are here concerned in this appeal relates to the payment which the plaintiff made in satisfaction of the decree obtained by the landlord.

[31] The defendants, so far as the claim to the property itself was concerned, contended that they had acquired under their purchase from the plaintiff's mother an absolute interest. This contention, however, has been negatived by the Courts below, and we take it that, upon Sudhamoyi's death, the right to the property devolved on the plaintiff under the law of inheritance, and that the defendants, at the time when the payment was made by the plaintiff, had really no interest in the said property. It would, however, appear that at the time when the decree was obtained by the landlord, and at the time when the plaintiff made the payment, the defendants claimed the property as theirs; and the question that we have to decide in this appeal is whether, under these circumstances, the said payment was a voluntary one or not.

There can be no doubt that if the plaintiff had not paid up the decree of the landlord, this property would have been sold up. What might have been the estate which the purchaser would have acquired under the sale is no doubt another question. It is quite possible that he would have acquired only the right, title and interest, whatever that might have been, of the defendants. But still the property was liable to be sold in execution of the decree obtained by the landlord, and there was at that time a question between the parties as to whether the property really belonged to the plaintiff or to the defendants. Under these circumstances the plaintiff paid up the decree and saved the property from sale. She was, as it seems to us, interested in the payment of the money, and as such she paid it in order to save the property from being sold.

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In this view of the matter the case falls under s. 69 of the Contract Act. But it seems to us that the case might also fall under s. 70 of the said Act which runs as follows : " Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered." Now the decree, as we have already mentioned, was a decree that was obtained against the defendants, and, so far as the payment in question was concerned, it relieved the defendants from their liability to the landlord, and therefore it is clear that when the plaintiff made the payment in question [32] she did it for the defendants, and apparently not gratuitously. There can also be no question that the defendants enjoyed the benefit of this payment, because, as we have already said, it relieved them from their liability to the zemindar.

The principle which underlies s. 70 of the Contract Act seems to have been considered in two or three important cases, and we may as well here refer to them. The first is the case of *Smith* v. *Dinonath Mookerjee* (1), in which a question somewhat similar to that which arises in this case was considered, and the learned Judges there held that the payment was not a voluntary one, but was a payment which fell either under s. 69 or under s. 70 of the Contract Act. In the case of *Jugdeo Narain Singh* v. *Raja Singh* (2) where in execution of a decree the plaintiff had purchased certain property, and the defendant, in execution of another decree against the former owner of the property, proceeded to execute his decree against the same property, and the plaintiff, in order to prevent the sale, paid the amount of the defendant's decree into Court, and subsequently brought a suit against the defendant to recover the amount so paid to prevent the sale, it was held that the payment was not voluntary, and that the plaintiff was entitled to recover the amount paid. The learned Judges there considered, among a variety of cases, the case of *Dulichand* v. *Ramkishen Singh* (3) decided by the Privy Council. The facts of the case before the Privy Council were no doubt different from those with which we are concerned in the present case, but we think that the principle which underlies that case is equally applicable to the present case.

We think that upon the authorities to which we have referred, and upon the reason of the thing, the payment made by the plaintiff could not be regarded as a voluntary payment, and therefore she is entitled to recover the amount paid whether the case falls under s. 69 or under s. 70 of the Contract Act.

The result is that this appeal will be allowed, and the plaintiff will recover judgment for the amount claimed, with costs in all the Courts.

J. V. W. *Appeal allowed.*

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(1) 12 C. 213. (2) 15 C. 656. (3) 7 C. 648=8 I. A. 93.

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[33] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

KANTI RAM AND OTHERS (*Plaintiffs*) *v.* KUTUBUDDIN MAHOMED AND OTHERS (*Defendants*).* [20th August, 1894.]

Mortgage—Sale of mortgaged property—Suit for sale of mortgaged property without redeeming prior mortgage—Form of decree—Transfer of Property Act (*IV of* 1882), *ss.* 48, 58, 60, 67, 74, 85, 86, 88, 89, 91, 92, 96, 97.

In a suit on a mortgage by a second mortgagee, to which the prior mortgagee was a party, and in which the plaintiff prayed that the amount due to him might be realized by a sale of the mortgaged property, the Courts below dismissed the suit, holding that the plaintiff was not entitled to sell the mortgaged property without redeeming the prior mortgage : *Held*, that this decree was erroneous, and that the plaintiff was entitled to an order for sale of the mortgaged property subject to the lien of the prior incumbrancer.

The words "immoveable property" in s. 58 of the Transfer of Property Act denote, having regard to the definition of "immoveable property" in s. 2, cl. 5 of the General Clauses Consolidation Act (I of 1868), not only the property itself as distinguished from any equity of redemption which the mortgagor might possess in the property, but include the rights of the mortgagor in the property mortgaged at the time of the second mortgage, or, in other words, his equity of redemption in such property. A second mortgage therefore is, as well as a first mortgage, a mortgage of "specific immoveable property" under s. 58. The cases of *Vencatachella Kandian* v. *Panjana Dien* (1), *Khub Chand* v. *Kalian Das* (2), *Raghunath Prasad* v. *Jurawan Rai* (3), *Gangadhara* v. *Sivarama* (4) and *Umes Chunder Sircar* v. *Zahur Fatima* (5) referred to and approved as to the right of a second mortgagee to a sale, subject to the lien of a prior mortgagee.

[**Diss.**, 1 O.C. 53 (59); **R.**, 29 A. 385=4 A.L.J. 273=A.W.N. (1907) 97 (**F.B.**); 34 A. 323 (328)=9 A.L.J. 323=14 Ind. Cas. 674 (676); 23 C. 795 (798); 30 C. 599 (605); 11 C.P.L.R. 75 (76); 14 C.P.L.R 177 (179); 1 O.C. 105 (110): 3 O.C. 254 (257); 64 P.R. 1908=132 P.W.R. 1908; 2 Ind. Cas. 495; **D.**, 1 L.B.R. 210 (211).]

THIS was a suit to recover Rs. 970 due on a simple mortgage bond, dated 1st Kartick 1295 Fasli (2nd October 1887), by which a share in certain immoveable property was hypothecated by the first defendant in favour of the plaintiff. The second and third **[34]** defendants were alleged to be subsequent mortgagees of the same property ; and a fourth defendant was said to be a purchaser of the property in question in execution of a decree. The plaintiffs prayed for realization of the money due under the mortgage by sale of the mortgaged property free from the lien of the subsequent mortgagee.

The second defendants alone appeared, and contended that they were prior mortgagees, and that if the plaintiffs were entitled to a decree it must be subject to their lien.

The Munsif found on the facts that the second defendants were prior mortgagees, and, holding that the plaintiffs could not bring the property to sale without first redeeming the prior mortgage, dismissed the suit.

The plaintiffs appealed, and the Judge, in dismissing the appeal, gave the following judgment :—

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* Appeal from Appellate Decree No. 479 of 1893 against the decree of F. W. Badcock, Esq., District Judge of Bhagulpore, dated the 27th of January 1893, affirming the decree of Babu Rakhal Chunder Bose, Officiating Munsif of Monghyr, dated the 4th of March 1892.

(1) 4 M. 213. (2) 1 A. 240. (3) 8 A. 105.
(4) 8 M. 246. (5) 18 C. 164=17 I.A. 201.

"The appellants' pleader refers to the case of *Mata Din Kasodhan* v. *Kazim Husain* (1), and contends that a subsequent mortgagee may either pay off prior mortgagees, or bring a suit, and bring the property to sale subject to the prior mortgages. He says that under s. 69 of the Transfer of Property Act, any mortgagee can sue, and that there is no provision that a subsequent mortgagee must before suing pay off all the prior mortgagees. He also argues that s. 96 of the Transfer of Property Act, plainly contemplates the sale of a property subject to a prior mortgage.

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"The respondents' pleader urges that when under s. 85 of the Transfer of Property Act all the parties are, in a suit like the present, before the Court, it becomes the duty of the Court to determine the rights of the subsequent mortgagees, and the rights of the prior mortgagees, and in that case the provisions of s. 75 apply, and the only right that a subsequent mortgagee has is to pay off the prior mortgagee. The pleaders have not pointed out any Calcutta case exactly in point, and I cannot find any. I think there is no doubt that the object of s. 85 of the Transfer of Property Act was that all the mortgagees should be brought before the Court, and I think that the only reason for so bringing them is that their respective rights should be determined. The appellant's pleader suggests that they were only made necessary parties to determine the validity of their mortgages, but it is obvious that it would save litigation if the rights of all the defendants were settled in one suit. There would be no difficulty in doing this, and I therefore see no reason why the Court should decide only whether the mortgages were valid or not, and abstain from [35] deciding the more important point, *viz.*, the right of the defendants as against each other. When the parties are once before the Court under s. 85 I have no doubt that s. 75 applies, and in that case the subsequent mortgagees can have no right beyond that enjoyed by the mortgagor, *viz.*, the right to pay off the prior mortgagee. It is true that the terms of s. 67 are general, but I consider that s. 75 clearly limits the right of a subsequent mortgagee as against a prior mortgagee. Section 96 is not, I think, of importance. Cases, no doubt, occur where, owing to a prior mortgagee not being made a party to the suit for sale, the property is put up for sale, subject to the prior mortgage, and this section merely provides what the prior mortgagee may do in such a case. The appeal is dismissed with costs."

From this decision the plaintiffs appealed on the grounds that the suit should not have been wholly dismissed, but that the plaintiffs should have been held entitled to sell the property subject to the prior mortgages.

Babu *Saligram Singh* and Babu *Mahabir Sahae*, for the appellants.

Mr. *C. Gregory* and Babu *Rajendro Nath Bose*, for the respondents.

The arguments and cases cited are sufficiently given in the judgment of the Court (GHOSE and GORDON, JJ.) which was as follows:—

JUDGMENT.

This was a suit to enforce a mortgage security. The mortgage in question was executed by one Chowdhri Mahomed Monim in favour of the plaintiffs on the 2nd October 1887, by which a 5 anna 4 pie share of *mouza* Sairchakla was hypothecated as collateral security for the money lent. The plaintiffs asked that the amount due to them might be realized by the sale of the mortgaged property.

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(1) 13 A. 432.

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In this suit, not only the mortgagor, but several other parties were made defendants, some of them holding mortgages of the same property of dates antecedent to the date of the plaintiffs' mortgage, and others holding mortgages of subsequent dates. The plaintiffs, however, treated all of them as second mortgagees, and as such asked that the property mortgaged to them might be sold free from the lien of the mortgagees-defendants.

The suit has been dismissed by both the Courts below upon the ground that the plaintiff is not entitled to bring to sale the [36] mortgaged property without first redeeming the prior mortgages.

The present appeal is by the plaintiffs.

It has been contended on behalf of the appellants that the lower Courts have proceeded upon a mistaken view of the law on the subject, and that they are entitled to bring to sale the mortgaged property subject to the lien of the prior mortgagees, and that what would be acquired by the purchaser under the sale is the equity of redemption which existed in the hands of the mortgagor at the time of the second mortgage, *i.e.*, the right of the mortgagor to redeem the prior mortgages.

On the other hand, it has been contended on behalf of the respondents, relying mainly upon the case of *Mata Din Kasodhan* v. *Kazim Husain* (1)—a Full Bench decision of the Allahabad High Court—that the right of the plaintiffs, the second mortgagees, as against the prior mortgagees, is confined to the right which the mortgagor has against the prior mortgagees, that is to say, the right of redemption, and that the word "property," as defined in the Transfer of Property Act, means the actual immoveable property mortgaged, and not merely the particular rights and interest in such property as distinguished from the property itself, and that the bare equity of redemption could not be sold under the Transfer of Property Act. It has broadly been contended that, until the earlier mortgages are redeemed, the plaintiffs have no right to bring the mortgaged property to sale.

The question that has been raised before us is indeed a difficult one, and it requires careful consideration.

We purpose in the first place to review some of the sections of the Transfer of Property Act which bear upon this matter.

Section 58 defines what a mortgage is, and it says: "A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced, or to be advanced, by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability." And cl. (*b*) of that section defines what a simple mortgage is: "Where without delivering possession of the mortgaged property the mortgagor binds himself personally [37] to pay the mortgage money, and agrees expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee."

Now, in the present case, under the terms of his mortgage, the mortgagee has a right to cause the property mortgaged to him to be sold; and that property is the specific immoveable property of the mortgagor, burdened as it is with the prior incumbrance, *i.e.*, the property of the

(1) 13 A. 432.

mortgagor *minus* the interest which he had already transferred to the prior mortgagee; or, in other words, the interest which the mortgagor possessed at the time of the second mortgage.

Section 60 of the Act defines the rights and liabilities of a mortgagor; and one of the matters mentioned in the section is that he has a right to redeem the mortgage when the principal money advanced to him becomes payable.

Section 67 defines the rights and liabilities of a mortgagee, and it says as follows: "In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold." This section, as it will be observed, is not limited to the first mortgagee, but it uses the word "mortgagee," which we understand to refer to any mortgagee, either first or subsequent, and it does not qualify the rights of the second mortgagee in such a manner as to defer the enforcement of his rights under his mortgage until the first mortgage is due or redeemed.

Section 74 enacts: "Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such [38] tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender." And then s. 75 provides: "Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure aad sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor." Under the first of these two sections the subsequent mortgagee is entitled to pay up the first mortgage and to redeem it, and the other section defines what may be the rights of such subsequent mortgagee against a prior mortgagee, as also against a subsequent mortgagee; but it will be observed that the section does not define what may be the rights of the second mortgagee as against the mortgagor. And in this connection we may refer to s. 48 of the Act, which runs as follows: "Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be suject to the rights previously created." It would seem from this section that it was the intention of the Legislature that each successive mortgagee should have a right to enforce his mortgage according to its terms, subject to the rights of the prior mortgagees.

Section 85 enacts: "Subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage. Provided that the plaintiff has notice of such interest." It may be open to question whether a prior mortgagee is a

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person having an interest in the property comprised in a subsequent mortgage within the meaning of this section; but we think it safer to take it that he is such a person, and that he should be joined as a party [39] to a suit to enforce a second mortgage. The reason why we think this section was enacted was to protect the interest of all parties who may have some interest or other, either as prior mortgagees or subsequent mortgagees in the property mortgaged, so that the Court might be in a position to make an effectual decree adjusting the rights of all parties concerned.

Section 86 refers to a suit for foreclosure.

Section 88 treats of a suit by a mortgagee, and it says: "In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of s. 86, and also ordering that, in default of the defendant paying, as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same." The words used in this section are "the mortgaged property;" and it was contended before us that these words refer to the specific immoveable property as mentioned in s. 58, and not merely to the interest of the mortgagor and second mortgagee. But what is the mortgaged property? It is the property of the mortgagor burdened with the prior lien.

Section 89, in defining the procedure to be adopted by the Court in making an order absolute for sale, uses the same expression, "the mortgaged property."

Section 91 lays down the several classes of persons, besides the mortgagor, who may be entitled to redeem the mortgaged property: cl. (*a*), any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property; clause (*b*), any person having any interest in, or charge upon, the right to redeem the property. There can be no doubt whatsoever that the plaintiffs, the second mortgagees, have an interest in the right to redeem the property, and they might have, if they had so chosen, asked for that relief in the present case. But then the question is whether they are not entitled, notwithstanding this section, as also s. 75, to which [40] we have already referred, to bring the property to sale, *as it was mortgaged to them.*

Section 92 relates to a decree in a redemption suit, and after referring to the order which may be made for an account being taken and for the plaintiff-mortgagor paying into Court the amount due upon the mortgage, provides as follows: "That if such payment is not made on or before the day to be fixed by the Court the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property or (unless the mortgage be by conditional sale) that the property be sold." The word "property" used in this section, we take it is the mortgaged property, and that seems to be clear from the subsequent section 93, which speaks of an order that the mortgaged property be sold in the event of default on the part of the mortgagor in paying, within the time fixed by the Court, the amount due to the mortgagee.

Section 96 relates to the sale of property subject to a prior mortgage. This section, and the following s. 97, are to be found in a part of the Act which is headed "Sale of property subject to prior mortgage." The first

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mentioned section enacts : " If any property, the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold." The words " the sale of which is directed under this chapter is subject to a prior mortgage " to our minds are significant. It seems to us that the Legislature had in view, in framing this section, the sale of the property being subject to a prior mortgage ; otherwise we do not understand why those words should have at all been used ; and we are no way prepared to hold, as it was contended before us, upon the authority of the ruling of the Allahabad High Court, that those words are mere words of description. It will also be observed that the section empowers the Court to order that the property be sold free from any prior incumbrance, if the prior incumbrancer so consents ; and this to our minds is also significant because, as it seems to us, the Court might, in a suit where a prior incumbrancer is a party defendant, either order **[41]** that the sale of property should be held subject to the prior mortgage, or that it should be sold free from the incumbrance of that mortgage, if the prior incumbrancer so consents.

Section 97 speaks of the application of the sale proceeds, and it states that they should be applied—*first*, in payment of all expenses incident to the sale or property incurred in any attempted sale ; *secondly*, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ; *thirdly*, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ; *fourthly*, in payment of the principal money due on account of that mortgage." The language of this section strengthens the view which we have expressed in regard to s. 96, for it provides that the proceeds of the sale may be applied towards the payment of an earlier mortgage, if the property has been sold free from that mortgage, and that it may also be applied towards the payment of the mortgage, in consequence of which the sale was directed.

It was strongly contended before us that the words "specific immoveable property, " as mentioned in s. 58, denote the property itself as distinguished from any equity of redemption which the mortgagor might at the time possess in the said property. The words " immoveable property" have been defined in the General Clauses Act, I of 1868. S. 2, cl. (5) says : " immoveable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." Regard being had to this definition, it seems to us that the words "immoveable property" include the rights of the mortgagor in the property mortgaged at the time of the second mortgage, or, in other words, his equity of redemption in that property, and when the Legislature in s. 58, in defining what a mortgage is, speaks of the transfer of an interest in specific immoveable property, we are unable to say that, when a property, subject to a prior mortgage, is mortgaged a second time, or, in other words, when the mortgagor's equity of redemption in that property is mortgaged to another person, it is **[42]** not a mortgage of specific immoveable property within the meaning of that section.

It was further contended before us that under s. 75 of the Transfer of Property Act, the right which the second mortgagee has is only a right to redeem. But, as already pointed out by us, the section relates only to

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the right of the second mortgagee as against the prior and subsequent mortgagees; and what may be the rights of the second mortgagee as against the mortgagor must be gathered from the other provisions of the Act.

We have given the various sections of the Act our best consideration, but we are unable to agree with the learned vakil for the respondents in holding that, if in a suit by the second mortgagee for enforcement of his mortgage the prior mortgagee is made a defendant, his suit must be dismissed, unless it be for the purpose of redeeming the prior mortgagee. We think there is nothing in the Act which favours such a position.

It is, we think, now settled law that a mortgagor may either absolutely sell or mortgage his remaining interest in the property which he has already mortgaged, notwithstanding there may be a covenant in the earlier mortgage prohibiting such a sale or subsequent mortgage. The purchaser, or the second mortgagee, in that event stands in the place of the mortgagor and takes the property subject to the prior lien. When the second mortgagee seeks to enforce his mortgage, we do not see how the interest of the prior mortgagee can be at all prejudiced if the Court orders a sale of the mortgagor's then existing interest in the property. No doubt there is no distinct provision in Chap. IV of the Transfer of Property Act protecting the interest of the prior mortgagee beyond what may be taken to be contained in ss. 96 and 97 of the Act, still we do not see how his rights may in anywise be prejudiced if a sale be ordered of the rights of the mortgagor, whatever those rights may be; because, under the sale, the purchaser could not take any higher interest than what the mortgagor possessed at the time of the second mortgage, and all that the purchaser would acquire under the sale is simply the right of redeeming the earlier mortgage.

Reference was, however, made in the course of the argument [43] before us to the case of a usufructuary mortgage, it being contended that in such a case the provisions of Chap. IV of the Transfer of Property Act, so far as they relate to the sale of immoveable property, cannot work, if the view that we have expressed is the right one. But we are no way pressed by this consideration, because in the case of an antecedent usufructuary mortgage, the purchaser at a sale, at the instance of the second mortgagee, would only acquire the right to redeem the usufructuary mortgage notwithstanding the term of the usufructuary mortgage, or after expiry of the term, as the covenants entered into between the parties would permit, and he would not be allowed to obtain possession of the property under his purchase until the usufructuary mortgage is brought to an end. In like manner, in the case of a decree for foreclosure, subject to a prior usufructuary mortgage, the second mortgagee would not be entitled to obtain possession of the property in question until the earlier usufructuary mortgage is redeemed.

In a case where the prior mortgagee is not made a party, there could be no question, we think, that the property, burdened as it is with the prior mortgage, might be brought to sale, and the purchaser would acquire the interest of the mortgagor (as it existed at the time of the second mortgage), and that of the second mortgagee, and as such would be entitled to redeem the prior mortgage. We do not see why an order for sale cannot be made in a suit in which the prior mortgagor is a party—an order that the property be sold subject to the prior mortgage.

Referring to the case law on the subject we find that there are several cases in which, in circumstances like this, a sale was ordered by the

Court. We may, amongst others, refer to the case of *Vencatachelia Kandian* v. *Panjana Dien* (1), where Turner, C. J., observed :— **1894 AUG. 20.** — **APPEL-LATE CIVIL.** — **22 C. 33.**

"When a second mortgage is created in favour of a person, who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that dictates the preservation of the right **[44]** created by the first charge. I am unable to see why the acquisition by the first mortgagee of the right remaining in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the rights of the first mortgagee. If the first mortgagee had not acquired the rights remaining in the owner, it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently have applied to the Court to order a sale, (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale), then a sale should have been ordered of the property to discharge both mortgages, and the proceeds should have been applied to their satisfaction in order of priority ; but I believe the course which would have best fulfilled the contracts and secured the rights of the parties would have been to allow a sale subject to the first incumbrance."

The same view was adopted in the case of *Khub Chand* v. *Kalian Das* (2). In *Raghunath Prasad* v. *Jurawan Rai* (3) a Full Bench of the Allahabad High Court, presided over by Petheram, C. J., held, as we understand the judgment, that a second mortgagee has a right to sell the property hypothecated to him subject to the rights existing in favour of the first mortgagee, and the decree that was made in the cause was in accordance with this view. In *Gangadhara* v. *Sivarama* (4), the High Court of Madras held, in somewhat similar circumstances, that the plaintiff, second mortgagee, was entitled to sell the property subject to the lien of the prior mortgagees. In *Umes Chunder Sircar* v. *Zahur Fatima* (5), where the District Judge and the High Court in appeal decreed a sale of the mortgaged property free from all incumbrances, the nett proceeds of the sale to be divided amongst the mortgagees according to their respective priority, the Judicial Committee, while modifying the decree **[45]** of the High Court, upheld the order for sale. It was contended at the bar before their Lordships by Mr. Doyne that the decree was wrong in directing a sale of the whole property, and leaving the rights of the parties to be worked out against the purchase-money, and he claimed to treat the suit as a redemption suit. Upon this point their Lordships observed as follows : "To this it is sufficient to answer that the plaint asks for a sale, and that the plaintiff has not, till the hearing of this appeal, suggested that the Court should deal with the property in any other way. The decree is right in ordering a sale, and the respective rights of the plaintiff and Zahur in the purchase-money must be adjusted on the footing that the plaintiff has the right to redeem Zahur's two annas."

Reference was made to certain cases in the Allahabad and Bombay High Courts, namely, *Gaya Prasad* v. *Salik Prasad* (6), *Har Prasad* v. *Bhagwan Das* (7), *Mul Chand Kuber* v. *Lallu Trikam* (8) and *Parsi*

(1) 4 M. 213. (2) 1 A. 240. (3) 8 A. 105. (4) 8 M. 246.
(5) 18 C. 164=17 I. A. 206. (6) 3 A. 682. (7) 4 A. 196.
(8) 6 B. 404.

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v. *Girand Singh* (1) where an opposite principle is said to have been followed. But it will be found upon an examination of the facts of those cases, that the first mortgagee had, subsequent to the second mortgage, purchased the equity of redemption of the mortgagor, and it was held that the second mortgagee was bound to redeem the earlier mortgage. In that state of facts we should be disposed to say that the second mortgagee is not entitled to bring to sale the mortgagor's interest, because it no longer exists in the mortgagor: it has already passed into the hands of the first mortgagee.

The rule of law which we gather from the various sections of the Transfer of Property Act, to which we have already referred, may, we think, be supported by reference to s. 295 of the Code of Civil Procedure, wherein, speaking of the rateable distribution among various decree-holders of the proceeds of an execution sale, it is enacted as follows: "When any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, **[46]** giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold." The provision contained in this section seems to be similar in scope to ss. 96 and 97 of the Transfer of Property Act.

For these reasons we are of opinion that the decree of the Court below in dismissing the suit of the plaintiffs is erroneous. The plaintiffs in our judgment are entitled to have an order for sale of the mortgaged property subject to the lien of the prior incumbrancer, and we direct that the usual mortgage decree be drawn up in accordance with the Transfer of Property Act.

No order as to costs.

J. V. W. *Appeal allowed.*

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22 C. 46.

CRIMINAL REVISION.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

BASUMATI ADHIKARINI (*Petitioner*) *v.* BUDRAM KOLITA (*Opposite-party*).* [5th July, 1894.]

Defamation—Good Faith—Privilege—Letter written by Guru *outcasting member of his caste—Penal Code*, ss. 499, 500.

B, the *guru* or spiritual guide of the caste to which *K* belonged, issued a letter or *ajna patra* to *K's* fellow-villagers to the effect that as *K's* wife had been caught with a man of a lower caste, no one of her co-religionists should have any social intercourse with her, and in effect that she should be outcasted. *K*, proceeded against *B* for defamation, and *B* pleaded that the statements contained in the letter were privileged, having been made in good faith and for the public good, and that the case came within one of the exceptions to s. 499. It was admitted by *K* that *B* had no enmity towards him or his wife, and that it was the custom of the *guru* to settle such matters as those that had arisen in connection with his wife, and it was proved that the letter was issued after *B* had made an enquiry into the truth of the allegation. The lower Court convicted.

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* Criminal Revision No. 196 of 1894, against the order passed by A.L. Medlicott, Esq., Assistant Commissioner of Goalpara, dated the 24th of February, 1894.

(1) A.W.N. 1885, p. 155.

Held, that the conviction was wrong, it being clear that the statements contained in the letter had been made in good faith for the protection of the social and spiritual interests of the community of which *B* was the *guru*, **[47]** and that so far as they implied a censure on the conduct of *K*'s wife, they were justified by the authority with which *B* was vested as spiritual head of the community, and that therefore the case came within the seventh exception to s. 499.

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[D., 32 C. 1060 = 2 C.L.J. 396 (402) = 9 C.W.N. 847.]

THE accused in this case was charged with defamation, and was tried before the Assistant Commissioner of Goalpara, and convicted and sentenced under s. 500 of the Penal Code to a fine of Rs. 50.

The accused was the *guru* of the caste to which the complainant belonged, and the charge arose out of a letter or *ajna patra* outcasting the wife of the complainant which was circulated amongst his fellow-villagers. The main defence in the case was that the statements contained in the letter were privileged, being true and having been made in good faith and for the public good.

The facts of the case are fully stated in the judgments of the Assistant Commissioner and of the High Court.

The judgment of the Assistant Commissioner was as follows:—

" In this case the accused has been charged with defamation under s. 499. The facts of the case are as follows:—

"The complainant is one Budram, the accused one Basumati Adhikarini. Some time ago the accused, who is the *guru* of the plaintiff's *caste*, wrote and circulated among the complainant's fellow-villagers a letter prohibiting any of the people of his caste from eating with him. In fact, he was outcasted. The grounds for outcasting him were that the complainant's wife had had illicit connection with a man of another and lower caste. As a result of this order the complainant's wife and the complainant himself have been outcasted.

" The *nished patra* is filed and contains the defamation complained of. It was urged on behalf of the accused that the complainant's wife should be the complainant, as it was about her that the defamatory statement was made. It has been decided by the High Court that the husband, as he has been outcasted owing to the order, may fairly claim to have been defamed, so that argument is disposed of. The accused who admits having written the order filed next defends herself by saying that the statement was true, and that it was for the public good that the imputation should be published. I do not consider that this is proved. Considering the effect an order of this kind from a *guru* has, and how it entirely spoils a man's life if he is outcasted, I think there is too much disparity between the good to be gained by publishing such a story though true and the misery caused to the person outcasted. The effect of the order in this case is a striking instance of this. It is not asserted that the complainant has done anything worthy of censure. Yet **[48]** because his wife has been outcasted he has been outcasted also, and, though perfectly innocent, has had to suffer as much as she. It is argued that the seventh exception of the section applies. The accused pleads that her statement was privileged, inasmuch as she possessed authority resembling that specified in exception 7. Whether this be so or not may be disputed, but at any rate any statement made by a person in authority must be made in good faith, that is, with due care and attention. I do not think that the accused has showed that she made the statement with due care and attention. We have a story told by two men, who say they saw

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the complainant's wife and another man in the act of committing adultery. The matter was reported to her, but she takes no steps to find out the truth then, but a year after holds an enquiry and passes an order outcasting the woman.

"It was also argued that the ninth exception applies, namely, that the imputation was made in good faith for the protection of the interests of the *somaj*. This, I hold, not to apply on the same grounds that the seventh does not apply.

"In this case the complainant has suffered greatly from the action of the accused. In my opinion people in the accused's position, wielding such a power as they do, cannot be too soon made aware that they must not use their power without due consideration. Unless the complainant in such cases can prove defamation, he has no remedy and his whole life may be ruined by a careless word from some one whom he regards as his religious superior.

"In my opinion the accused is guilty of defamation, and I accordingly convict her under that section and sentence her to pay a fine of fifty rupees, which will be paid to the complainant as compensation."

Against that judgment the accused moved the High Court, the main grounds being that the lower Court had erred in holding that the defamation was not published in good faith, and that its reasons for so holding were erroneous, and that the publication was privileged. Other grounds were taken, but they are not material for the purpose of this report. A rule was issued on that application, which came on for hearing on July 5th, 1894.

Babu *Bassant Kumar Bose*, for the petitioner, in support of the rule.

No one appeared to show cause.

The judgment of the High Court (BEVERLEY and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The question raised in this case is whether the conviction of the petitioner Basumati Adhikarini, under s. 500 of the Indian Penal Code, is legal.

[49] The facts of the case are shortly these : The petitioner, who is the *guru* or spiritual guide of the caste to which the complainant Budram Kolita belongs, issued to the complainant's fellow-villagers a letter styled an *ajna patra* or order of the Balipur *satra*, or religious fraternity, to the effect that, whereas two persons named Jayaram and Narayan of the village came and informed the petitioner that a woman named Kutibari of that village had been caught with a man of the Jugi caste, the letter of prohibition was issued that, until the decision of her case, no barber, *Brahmin*, relation or co-religionist should have social intercourse with her, and that if they had such intercourse they would be guilty of the five sins and of rebellion against their *guru*. Some time after the issue of this letter Budram, the husband of Kutibari, as one of the persons aggrieved, complained against the petitioner for having defamed his wife by publishing the letter of prohibition. The defence was that the statement contained in that letter was privileged, it being true and having been made in good faith for the public good, and that the case came under one of the exceptions to s. 499 of the Penal Code. The Court below has found the accused guilty of defamation, and the contention on her behalf is that the conviction is wrong.

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The main ground upon which the correctness of the conviction is questioned before us is that the alleged defamatory statement is privileged, and that it comes within one or other of the last four exceptions to s. 499 of the Penal Code, and we think that ground is well sustained.

It is admitted by the complainant himself that the accused has no enmity towards him or his wife, and that it is the custom for the *guru* to settle matters like those that arose in connection with his wife. It is also proved by the evidence of Jayaram and Narayan, who are referred to as informants in the letter of prohibition and who allege to be eye-witnesses to the improper conduct of the complainant's wife, that the accused issued the prohibition after making an enquiry as to the truth of the accusation; and the learned Assistant Commissioner in his explanation says: "The nature of the enquiry had been already satisfactorily proved before that Court, and in making my judgment I accepted **[50]** the account of that enquiry given by the witnesses for the accused." We are, therefore, fully satisfied that the statement contained in the letter issued by the accused was made in good faith for the protection of the social and spiritual interests of the community of which the accused was the *guru*; and so far as it implies a censure on the conduct of the complainant's wife it was justified by the authority which the accused is vested with as the spiritual head of the community. The case, therefore, in our opinion, comes within the ninth and also within the seventh exception to s. 499 of the Indian Penal Code. This view is fully in accordance with the decision of the Bombay High Court in the case of *Reg.* v. *Kashinath Bachaji Bagul* (1), and also with the opinion of Turner, C. J., and Muttusami Ayyar, J., in *The Queen* v. *Sankara* (2). In this latter case the learned Judges held that statements similar to those made in the case now before us were privileged, though they found the accused guilty of defamation by reason of the indiscriminate way in which the statement was published.

For the reasons given above we think the accused has been improperly convicted, and we, therefore, set aside the conviction and sentence and direct that the fine, if levied, be refunded to the accused.

H. T. H. *Conviction quashed.*

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22 C. 50.

CRIMINAL REFERENCE.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

THE QUEEN-EMPRESS v. JAGAT CHANDRA MALI AND ANOTHER (*Accused*).* [17th July, 1894.]

Pardon, Withdrawal of—Conditional pardon to prisoner—Power of Sessions Court to try person not committed—Approver, Evidence of—Criminal Procedure Code, ss. 162, 193, 337, 339, 374—*Evidence Act*, ss. 24, 30.

Two persons, *J* and *U*, were charged with the murder of *U's* husband, and in the course of the police enquiry made certain statements to the police. They were then sent up by the police to a Deputy Magistrate for **[51]** enquiry. *J* made three statements on the 28th of February, the 1st of March and the 9th of March, 1894, respectively, two of which were confessions, the third being a withdrawal

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* Criminal Reference No. 15 of 1894, in Criminal Appeal No. 391 of 1894, made by H. Cox, Esq., Sessions Judge of Tipperah, dated the 5th June, 1894.

(1) 8 B.H.C. Cr. 168. (2) 6 M. 381.

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of such confessions. *U* also made two statements on the 2nd and 9th of March, the first of which was a confession and the second a withdrawal thereof. On the 24th of April, *U* was tendered a pardon, and was thereafter treated as an approver, in which capacity she gave evidence against *J*. *J*. was then committed to the Court of Sessions to take his trial, *U* being sent up as an approver. In the Sessions Court, *U* resiled from her deposition before the committing Magistrate, and was then and there treated as an accused person, and placed on her trial with the other accused, and the deposition aforesaid was put in as evidence. Both accused were convicted mainly on their confessions, *J* of murder and *U* of abetment of murder.

Held, that the conviction of *U* was bad, the Court of Sessions having had no jurisdiction to try her as she was never committed to that Court by any competent Magistrate.

Held, that the conviction of *J* was also bad—

(1) Because *U's* statement to the police was not admissible in evidence.

(2) Because her statements on the 2nd and 9th of March were not under the circumstances admissible in evidence, as she was not being legally tried jointly with him for the same offence.

(3) That her deposition on the 24th of April was not admissible in evidence, because, apart from other reasons, *J* had no opportunity to cross-examine her.

(4) Because *J's* confession, under the circumstances, was not a free and voluntary admission of guilt.

Held, on the whole case, that independently of the aforesaid statements and confessions there was not sufficient evidence to justify the conviction.

Queen-Empress v. *Rama Tevan* (1), commented on.

[F., L.B.R. (1893—1900) 536 (537); R., A.W.N. (1907) 178 (179).]

THIS was a case in which two persons named Jagat Chandra Mali and Udoy Tara had been convicted, in a trial held before the Sessions Judge of Tipperah with the aid of assessors, of the murder of one Brindabun Mali, the husband of the second accused, and sentenced, the former to death and the latter to transportation for life.

The case was referred to the High Court for confirmation of the sentence of death, and both the accused appealed.

The facts of the case, so far as they are necessary to be stated for the purpose of this report, were as follows:—

[52] It appeared that the deceased Brindabun had been married to Udoy Tara for about ten or twelve years, and that they lived together for a period of about two years prior to the death of the former in the *bari* of Sharat Chandra Mali at Kandipur, in Tipperah. Sharat Chandra was the brother of Udoy Tara. Jagat Chandra Mali, the first accused, was a nephew of Sharat Chandra and Udoy Tara. He appeared to have had no fixed place of residence, but resided sometimes at Kandipur in Sharat's *bari* and sometimes at Kartola and Abarganj. He appeared to be considerably younger than Udoy Tara, and it was alleged and made part of the case for the prosecution that an intrigue had existed between him and Udoy Tara for some years, that she and her husband Brindabun did not live on very friendly terms, and that disputes between them were of no unfrequent occurrence.

On the night of the 26th February 1894 Brindabun was murdered, his body being found lying in a bamboo clump not far from the house in which he and his wife were then residing with Sharat Chandra, they all occupying one room. It was clear from the nature of the injuries that death had been caused by blows inflicted by a *lathi* or some such weapon.

(1) 15 M. 352.

At the time the body was found life was not extinct, there being evidence to show that he was heard to groan or utter a gurgling noise. So far as the evidence went, independent of the statements made by the two accused, it appeared that Sharat's attention was called to the noise outside the *bari* at about half-past twelve at night by Udoy Tara, who woke him up. Sharat, Brindabun, Udoy Tara, and two sons of Brindabun had apparently all retired to rest in the one room that night. On being woke up Sharat saw Brindabun was not in the room, and hearing the noise procured a lamp and was proceeding to the spot whence it came, when Udoy Tara told him not to go alone. He accordingly called out to a neighbour named Jagannath, and the three then proceeded to the bamboo clump, where they found Brindabun lying and groaning. Further assistance was obtained, and on Udoy Tara being questioned she was alleged to have stated that she did not know how it had happened, but that her father had previously fallen in a fit there, and perhaps the *shaitan* had attacked and killed Brindabun also. Brindabun was then carried into the **[53]** house, and appeared to have shortly afterwards died. No information was given to the police that night, but in the morning, apparently about 8 o'clock, Sharat went to the thannah and gave the information stating that the devil had killed Brindabun. This information, though apparently duly recorded by the police, was not treated by them as the first information, but was suppressed and not produced at the trial.

On receipt of this information a Sub-Inspector of Police and a Constable proceeded to the scene of the occurrence to enquire into the matter and then recorded certain statements. Amongst them was a statement made by Udoy Tara which, on the face of it, purported to have been made at 9½ A.M. on the 27th February, Tuesday, and which was treated by the police and throughout the subsequent proceedings as the *first information.* In that statement Udoy Tara was alleged to have admitted the existence of an intrigue between herself and Jagat Chandra, and to have stated that Brindabun was aware of that fact. She was further alleged to have stated that Jagat had been at the *bari* the previous Sunday, and that he had slept at the house of Ramraton Mali, a near neighbour, that night; that at 10 P.M. that night she met him near a tank on the east of her *bari*, when he threatened to kill Brindabun, and that he would also cut her if she told of it; that she had told her husband of this; and that Jagat had come again the previous day and left about 8 P.M. The statement then continued as follows :—

"Yesterday night I, my brother Sharat Chandra Mali, my two minor sons and my husband slept in our south house in the same bed. At about 11 P.M. of the night Jagat Chandra Mali came to our *bari* and remained on the west of our sleeping house. From behind the door he called "Salesbar Ma" get up and hear her. I said I can't go. At that time my husband went out in search of him, but not having seen him he came back to the house. After some time he went out to obey the call of nature. A short time after I heard the screams of my husband towards the tank, and then immediately came out of the house and saw Jagat throw my husband in the bamboo clump, and then run away towards the north. He had a thick *lathi* in his hand.

"It having been a moonlight night, I could distinctly recognise and see them. I suppose that my husband was thrown in the bamboo clump to make people believe that he has been killed by a devil. Having seen this, I cried **[54]** aloud, and my brother Sharat Mali came out of the house and called Pitumbar Mali and Jagannath Mali and brought my husband home. He

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could then only groan, but could not speak; after that he died. I did not, through fear, disclose anything about the occurrence. I make these statements, praying for an investigation against Jagat Chandra Mali."

It appeared that the accused Jagat Chandra Mali was arrested on the following Wednesday, *viz*., February 28th, at the house of one Ram Kumar Mali in Kartola, which was stated to be about 1½ *prohurs* journey from Kandipur, and at 11 P.M. that night he was taken before Babu Harendra Lal Kastagiri, Deputy Magistrate, for the purpose of a so-called confession made by him being recorded. The following was the statement he then made:—

On last Friday at 12 o'clock I came to Sharat's *bari*. Before that I lived in the house of my cousin Ram Kumar Mali, resident of *mouza* Kartola. Brindabun used to live in the house of Sharat. I was in Sharat's *bari* on Friday, Saturday and Sunday. During this time Brindabun's wife, Udoy Tara, asked me to kill Brindabun and to take her away with me. Since nine years I had illicit connection with Udoy Tara. Owing to her having had intrigues with me Brindabun used to exercise control over her. It was owing to this Udoy Tara asked me to kill Brindabun. Udoy Tara advised me to do so, since two years. Even on Monday at 12 o'clock she told me you better kill Brindabun. If you don't do so, I shall either commit suicide or kill Brindabun. If you wish you may see it. After taking my midday meal in the house of Ratan Mali, I went to Kaliazuri. From Kaliazuri I returned in the evening to Sharat's house. There was suspicion in my mind that Udoy Tara shall either commit suicide or kill Brindabun. On two previous occasions Udoy Tara wanted to hang by the neck with rope. I prevented her. After coming to Sharat's house, I sat on the east *chandara* of his house. I came there after candle light. At 9 P.M. of the night Sharat returned home from Mr. Delawnay's house. After taking supper Sharat and Brindabun went to bed for sleep. Brindabun's wife was sitting up to 11 o'clock night with a light. At 11 o'clock night Brindabun called Sharat and went out to make water. Brindabun after making water entered into the house. A short time after this Udoy Tara again asked Brindabun to go out. In order to go out to make water Brindabun's wife called Brindabun. After repeated calls, Brindabun got up to go out. I purposely went and stood up beneath the bamboo clump of Tukan. Brindabun and Udoy Tara came out of the house, and both sat on a place on the east, behind the courtyard. Brindabun's wife went towards the north, and after making water there she again sat by the side of Brindabun. They then both talked to each other. At this time Sharat came from behind and struck Brindabun with a *lathi* on his shoulder. Brindabun having got that hurt screamed out, when Udoy Tara muffled his [55] mouth with her hands. Sharat then muffled his face with a cloth. After that Sharat and Udoy Tara dragged Brindabun towards the tank. The water of the tank was dried up. Brindabun was thrown below the *ghat* of the tank. After that Sharat again began to strike Brindabun with a *lathi* on his head. I saw all these from the bamboo clump. There were ruptures on Brindabun's head, and the blood came out of them. After that Brindabun was removed to the bamboo clump. They could not see me. After that Sharat and Udoy Tara went back to the *ghat*. There Sharat's sister, Udoy Tara, poured water on the dried up place. Sharat began to rub with his hands the blood of the said place. Sharat threw his *lathi* on the water. After that Sharat and Udoy Tara went back to their house. On that very night I went to Kartola within *thana* Borkamta. Sharat and Udoy Tara did not see me. I did not say anything about

this occurrence to any one. In the day time of Monday Udoy Tara asked me to go back to her house. 1894 JULY 17.

On the 1st March, Jagat Chandra Mali made another statement before another Deputy Magistrate, Babu Bissessur Bhuttacharji, charging himself and Udoy Tara with the murder. The following is a copy of that statement:— CRIMINAL REFERENCE.

"*Q.*—What did you do? 22 C. 50.

"*A.*—I had illicit connection with Brindabun's wife. It is now nine years that I had intrigue with her. Since two years Brindabun's wife tells me to murder Brindabun, and to take her away. Brindabun does not give the expenses of her food, nor her clothes, etc. I have been supplying all these to his wife. She asked me to kill him, and said that if you don't do this, I shall myself commit suicide or kill him or kill you. Owing to my not having killed Brindabun, his wife went to hang herself in the tree on two nights. Having seen this, I brought her back. Ten or twelve days ago I went to Moobichal. I returned on last Friday at noon. Again Brindabun's wife asked me to kill him. But even then I did not do so. Friday, Saturday and Sunday passed, and on Monday at two *prohurs* she said 'if you don't kill him to-day, I shall kill myself.' Even then I prevented her, but she would not mind it. She gave me a bamboo at two *prohurs* of the day. She asked me to make a *lathi* with it and to kill him. At about 11 or 11½ o'clock night Brindabun's wife called out Brindabun and took him to the bank of the tank. Both of them sat in the same place. I was on the bank of the tank at a distance. Brindabun's wife putting her hands upon her head gave me a hint to beat Brindabun, but even then I refused to do so by giving her a hint. After that she gave me a hint with her hands to beat him. Not being able to bear the trouble I gave a blow on his shoulder with a *lathi* when Brindabun screamed out, and his wife put her hand over his mouth and threw him down and got over him, and again asked me to strike him on his head. She called me thrice. Even then I did not speak. She again asked me to strike. I then struck him on his head. He died. Brindabun's **[56]** wife said: 'He should not be kept here, he should be removed to the bamboo-clump and kept within the narrow gap between the bamboos, so that the people may know that he has been killed by a *bhut* (devil), as my father was killed by a *bhut*,' I said that I alone shall not be able to remove him there. We both lifted him up and removed him to the bamboo clump and kept him within a gap between the bamboos. In the night Brindabun's wife washed away the blood which fell on the *ghat*, and she also washed the blood off her cloth. The cloth was of yellow *piri*. She then told me to go away from the place at night. I said where shall I go at night. She said: 'Anyhow you must go to-night.' After that I came away that night.

"*Q.*—Where is the *lathi*?

"*A.*—I threw it near the houses of the Mahomedans on the west of the road, which lies on the west of the old *doctor-khana*, and which passes towards the south.

"*Q.*—Did you make these statements voluntarily, or you said so through fear or inducement of any one.

"*A.*—I made these statements voluntarily. I stated the true facts. What is the necessity of making false statements in a Court of Justice."

After that statement was recorded Udoy Tara was also charged with the murder, and on the 2nd March she made another statement before

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Babu Bissessur Bhuttacharji, the Deputy Magistrate. That statement was as follows :—

Q.—What do you know about the death of Brindabun ?

A.—On the night of Monday last Jagat Chandra killed Brindabun. On his asking me I caught hold of Brindabun's two hands.

Q.—Why did you kill, and how did you kill ?

A.—About a month ago there was a quarrel between my husband Brindabun and Jagat Chandra. Jagat Chandra told me "anyhow I shall kill your husband." On Sunday evening Jagat Chandra told me: "On Monday night you take him to the bank of the tank on some pretext, you catch hold of him by muffling his face with cloth, and I shall then strike him. If you do not do that I shall strike on your skull." He threatened me, and I agreed to his proposal. On Monday night Jagat Chandra told me "take him to the bank of the tank on pretext of the call of nature." At 12 o'clock night I took him to the bank of the tank and I attended to the call of nature. After going into the water of the tank, I asked him to advance a little, "I am afraid." My husband advanced and sat upon the ground. Jagat Chandra struck him on his shoulder and threw him down, with face upward, and said catch hold of him, "catch hold of him," he asked me to catch hold of him by his face. I said I cannot catch him by his face. I caught hold of my husband's two hands. After [57] that Jagat gave three strokes on his shoulder, head and face. He then asked me to go home, and see if my brother was awake. I went and saw that my brother was not awake. On my return I saw my husband being removed in his lap in a cross-way towards the bamboo clump. I said why do you take him to the bamboo clump. He said if he is taken to a bamboo clump, the people will suspect of his being killed by a devil. He asked me to catch by his legs. I said I cannot catch him by the legs, after that I caught hold of his head. Keeping him in the bamboo clump, Jagat and I came to the tank and washed our hands. Jagat put the *lathi* on the ground. I wanted to throw the *lathi* into the water. He said don't throw the *lathi* into the water. If you do so it will cause ruin. You make over my *lathi* to me. After that, when we washed our hands and feet, he said "go and sleep in the house," let me go in my own way. He prevented me from calling my brother. Jagat Chandra was standing by the back door. After entering into the house I smoked tobacco and went to bed. After Jagat had gone away from the *bari*, I called my brother. He replied and said why did you call me. I said "is it now the dawn of day." There was a talk of preparing *chira* (parched rice). He said there is yet night. I said "see what makes *huhu* noise towards the tank." My brother heard the noise by lending his ears and then stretched his hands over the bed, and said that Brindabun was not there. He asked me to light a lamp. I lit a lamp, after that my brother wanted to go out. I prevented him, saying if you go alone you will be frightened.

Upon that he called the next door neighbours Jagannath and Petumbar. Three of them went. I also went with them with a lamp in my hand. From the bamboo clump three of them brought my husband home lifting him up. After that they said "a devil has killed my father there, he has also been killed there." After he was taken into the house he survived for quarter of an hour. After that he died.

Q.—What was the reason of the quarrel which took place a month before ?

A.—Jagat Chandra used to go to our *bari* and remained there, and would take betels and smoke tobacco. For this there was a quarrel.

Q.—What is Jagat Chandra to you? Why did you kill your husband jointly with him?

A.—I am Jagat Chandra's father's kinswoman. I had an intrigue with him (Jagat Chandra).

Q.—Why did you not state all these when you previously gave deposition to me?

A.—So long I did not say, he threw everything upon me, and I therefore said.

Q.—How could you know that everything was thrown upon you?

A.—At that time in the jail he said to the Court Babu, that Sharat and his sister killed him, lastly he changed his version, and said Sharat did not know anything, he and I killed him.

[58] *Q.*—Whether the statement made by you before is correct, or the statement made by you now is correct?

A.—The statement made by me now is correct.

Q.—Has anybody frightened you or tutored you to make such statements?

A.—No.

Q.—Whether Court Babu or Inspector Babu went to the jail?

A.—Both Court Babu and Inspector Babu went to the jail.

On the 9th March both Jagat Chandra and Udoy Tara retracted their confessions before the same Deputy Magistrate. The following are the statements then made by them:—

Jagat Chandra Mali. *Q.*—Whether the statements made by you before me, ere this, are true, or you want to say anything more?

A.—The said statements are not correct. I never beat him.

Q.—Why did you confess before?

A.—Daroga Babu and Inspector Babu threatened me to say so. I was told you say so, otherwise you will be hanged. They ordered four constables to beat. Two of them gave me two fists. They said you say so, otherwise you will be pressed with a bamboo.

Udoy Tara. *Q.*—Whether the confession made by you before me is true, or whether you wish to say anything more?

A.—That is not true. I spoke about murdering, I said that he killed. He did not kill, that is, Jagat Chandra did not kill.

Q.—Who killed your husband?

A.—I can't say.

Q.—What did you see?

A.—At 12 o'clock I heard the groaning on the bank of the tank. After that I called my brother, and lit a lamp. I told him not to go alone. He called Jagannath, and then went to the bank of the tank. Petumbar, Jagannath and Sharat brought him into the house by lifting him up.

Q.—Why did you say before that he killed him?

A.—The Daroga threatened me. He wanted to beat me. He wanted to insult me, he told me to state his name, and then I shall be saved.

During the preliminary enquiries before the convicting Magistrate, Udoy Tara was tendered a pardon under the provisions of s. 337 of the Code of Criminal Procedure, and the tender having been accepted, her deposition was recorded on the 24th April. It was in the following terms to:—

"My brother Sharat has a *bari* at Kandipur. I and my husband used to live in the same *bari* with him. We had but one *ghur*. Jagat lived with us for about a year, and used to work there at Mr. Delawnay's house. He left

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our [59] *bari* in Pous, as my brother said he must go away as people talked of my illicit connection with him. I had illicit connection with him. This connection originated about three years before Jagat left the house. I was married about ten years ago, and the connection originated four years after the marriage. Jagat went to his aunt's house in Kandipur after leaving our *bari*. Thence he went to Barora. One Saturday in Falgun, Jagat came to our *bari*. He took meals at two *prohurs* at our *bari*. He slept at the night at Rutton's *bari*. On Sunday night Jagat prepared *chira* at Rutton's *bari*. On Monday morning, he took meals at Rutton's *bari*, and said he would go to Barora. This he said at Rutton's *bari* when I was present. At about 10 A.M. he told me at the bank of the tank that he would not go to Barora, but would stop somewhere on the way, and come back to our *bari* at 8 P.M. and murder my husband; he said he would come to our *pacha* door, and wait under the mango tree. He advised me to take my husband out at twelve at night on the pretext of nature's call after Sharat had taken food and slept. At twelve, I asked my husband to accompany me saying I had nature's call. After coming to the yard, as I was about to go towards the bank of the tank, my husband asked me to go to the *chora* in the west. I said I won't go to the bank of the tank, as there was water in the tank. My husband went before me. I went following him, I evacuated, and then got down in the tank. My husband was at a distance then, and I asked him to come near saying I was afraid. He came within a distance of five or six cubits from me. Jagat came there from under the bamboo clump, and struck my husband on neck with a *lathi*. My husband shrieked and fell down supine. Jagat asked me then to catch hold of his throat. I said I could not, and I caught hold of my husband's hand. Jagat then struck my husband on face. About three blows were given on the face. Jagat then asked me to see whether my brother had been awake. I went and stood at the door, and found he was not awake. I came again to the bank, and I found Jagat taking my husband to the bamboo clump. Jagat asked me to seize him by the leg. I seized him by the head, so that the head could not fall on the ground. My husband was taken to the bamboo clump, where his body was shoved into the clump, with feet upwards, and head downwards.. Jagat then asked me to go to my room, and lie down, adding he would go to Barora, and come back on Wednesday or Thursday. Jagat took away his *lathi*. I threw the *lathi* into the water at first near the bank, but Jagat on being informed of it stated that would be ruinous, and took away the *lathi*. Jagat said that if the body were thrown into the bamboo clump, people would say Satan had killed him. My husband had life when he was placed in the bamboo clump. He groaned there, but could not speak. When Jagat asked me to go to my room, I said I was afraid to go alone. He came with me up to the room and then departed. I smoked and took betels and then lay down. After about half-an-hour I awakened my brother Sharat and told him there was arrangement about preparing *chira*. My brother said there was yet much of the night. I told him then "what is the [60] *huhu* sound towards the tank about?" My brother felt the bed, and said my husband was not there. He asked me then to light a lamp. I lighted one. The door was opened, and as my brother was going out, I asked him not to go alone, adding he would get frightened. He called Jagannath and Petumbar. Jagannath and Petumbar came. They, my brother and myself then brought my husband to the room from the bamboo clump. My husband was still groaning. He died about one *danda* after. Petumbar remained at

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our house for the rest of the night. I was present when the Daroga searched our *ghur*. He took two pieces of bloody cloth. One was worn by me and the other was in a basket on the *murha*. This piece was not covered up by anything. This piece of cloth belonged to me. It was placed on my husband's head in the room, and hence became bloody. The cloth I wore became bloody, when we took my husband from the bamboo clumb to the room. My cloth did not become bloody when my husband was brought from the *ghaut* to the bamboo clump.

(Identifies the accused Jagat)

Cross-examined—Nil.

(To Court).—I told a falsehood when I said in my first deposition I had illicit connection with Jagat from before my marriage.

Jagat Chandra was thereafter committed to the Court of Sessions on the charge of murder, and the case came on for hearing on the 23rd May before the Sessions Judge and two assessors. Jagat Chandra was defended and pleaded not guilty. Udoy Tara was the first witness called for the prosecution when she deposed as follows :—

My brother's name is Sharat. My husband and I used to live at Sharat's *bari*. Brindabun Mali is my husband's name. My husband and I had lived at Sharat's for the last two years. Jagat Chandra Mali I know. His *bari* is at Kandipur, the south *para*. He lived in Sharat's *bari* for some time, from Magh to Magh (last Magh). I was living also with my husband at that time in the *bari* of Sharat.

I don't know why Jagat left the *bari* of Sharat. I did not hear my brother saying anything to Jagat about the latter's leaving the *bari*. Jagat is my cousin's son. I had no *ashnai* with Jagat. My husband is dead. I don't know how he died. He died in Falgun at 12 o'clock at night. He was ill, and used to stay outside the house most part of the night. I gave evidence to the Deputy Magistrate.

I told the Deputy Magistrate in evidence that Jagat left our *bari* in Pous, as my brother said he must go away, because people talked of my illicit connection with him. I also told the Deputy Magistrate that I had illicit connection with Jagat, and had had such connection for three years. I told the Deputy Magistrate that Jagat advised me to take my husband out at [61] twelve at night on the pretext of my being called by nature, and after Sharat had taken food and gone to sleep. I did say this but I lied. I also told the Deputy Magistrate that I took my husband out on this pretext. But I lied then. (Witness warned about the consequences of perjury, says) I am speaking the truth now.

The Sessions Judge then recorded a note to the effect that the witness had by giving false evidence not complied with the condition on which the tender of pardon to her was made, and that she should therefore be tried for the offence (murder) in respect of which the pardon was tendered. He further recorded :—

"Her statements are given in evidence against her."

She was forthwith placed in the dock. The charge was amended by her name being added, and she pleaded not guilty. The trial of both accused then proceeded, and it appeared that throughout Udoy Tara was undefended and did not cross-examine any of the witnesses called for the prosecution.

The evidence against the accused consisted of the deposition of some twelve witnesses whose statements it is unnecessary for the purpose of this report to set out, the purport thereof, so far as the same is material, being given in the judgment of the High Court.

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During the trial the statements of Udoy Tara on the 27th February, 2nd and 9th March, and her deposition of the 24th April, were used in evidence against both the accused, her statement of the 27th February being used as the first information. The statements made by Jagat Chandra Mali on the 28th February, 1st and 9th of March, were also put in and used as evidence in the case against them both.

Both assessors convicted the accused, mainly relying on the ground that they had both confessed.

The Sessions Judge agreed with this finding. The following is the material portion of his judgment :—

"This was a case of murder of one Brindabun Mali at about midnight of the 26th February last (15th Falgun) at Kandipur, in the town of Comilla. To give a short account of the murder and how it came about as disclosed by the evidence, it is to be noted that the murderers were Jagat Chandra Mali and Udoy [62] Tara, the wife of Brindabun Mali, deceased. Jagat Chandra Mali is a good-looking young man, unmarried, and with no fixed place of residence apparently, and for some considerable time had been carrying on an intrigue, and having sexual intercourse, with Udoy Tara, who is a plain woman, seemly somewhat his senior. Brindabun Mali and his wife, Udoy Tara, lived at the house of Sharat Mali, Udoy Tara's brother, and Brindabun was evidently distasteful to his wife, owing no doubt to her connexion with Jagat Mali, and also it may well be, because her husband was not a very desirable man, having been suffering for several months past from an unpleasant disease, *viz.*, gonorrhœa. At any rate husband and wife did not get on together very happily and without frequent squabbles, and the latter even went so far as to threaten suicide rather than live with her husband. So things went on till she and her lover Jagat Mali arranged a plan for ridding themselves of Brindabun Mali, and on the 26th February (Monday) at or about midnight Udoy Tara, according to the preconcerted plan, induced her husband to go outside with her and stay close to her while she made water or performed a similar function of nature. Then Jagat Mali who was lying in wait for his victim suddenly attacked Brindabun with a *lathi* and beat him to death while his accomplice Udoy Tara took hold of her husband's hands or otherwise abetted the murder.

Such briefly was what happened, and then Jagat Mali saw the woman home and himself disappeared, carrying the instrument of murder, the *lathi*, with him. Udoy Tara retired to her bed, but later on she woke up her brother Sharat who slept in the same room, suggesting to him that food should be cooked, or on some pretext, and she called his attention to peculiar gurgling sounds outside. They lit a light and called out to a neighbour Jagannath, and then the three persons proceeded to a tank close by, whence the noise proceeded, and in some bamboos they found Brindabun Mali bleeding and at his last gasp. With the aid of another neighbour Petumbar they carried him, the dying man, to the house. Udoy Tara did not show any signs of remorse ; but she suggested that Brindabun had been killed by the devil or ghosts, as she declared her father had likewise been.

Now the evidence in the case was very clear, and I shall, [63] briefly indicate what it was. And first of all I would refer to the medical evidence.

"The lacerated wounds, the nasal and maxillary bones broken in pieces, the smashed teeth and the fractured arm and head bones, &c. point unmistakably to foul play and render the idea of accident or a fall quite impossible.

"Then there are the statements of the accused persons to consider.

"On the 28th February, Wednesday, there is Jagat Mali's first statement to the Deputy Magistrate.

"Confronted with the crime, and feeling that the theory of satan or ghosts would not do, he adopted a very usual course of trying to screen himself at the expense of others, and he told a story of how he hid himself in some bamboos and witnessed the murder of Brindabun by Sharat, assisted by his sister Udoy Tara. Now there is no evidence whatever to give the slightest colour of probability to the complicity of Sharat Mali in the crime. Doubtless it seemed necessary to Jagat Mali to implicate a man in the murder. A woman by herself would not meet the case, and so he chose Sharat, the most convenient person, and to make the matter otherwise inexplicable quite clear and simple, he himself was present to witness the deed he relates. The next day, however, 1st March, he made another statement to the Deputy Magistrate, another Magistrate, and herein he confessed that he had himself committed the murder after repeated persuasion to do so by Udoy Tara, the wife. The statement no doubt contained the truth so far as the fact of the murder by Jagat Mali is concerned. On the 9th March followed the usual withdrawal of confession, and avowal of police tyranny, followed by the plea of not guilty at the trial.

"On the 2nd March, Udoy Tara declared to the Deputy Magistrate that she had lured Brindabun, her husband, to the place where Jagat Mali was waiting to kill him; and that she assisted at the murder, though on the whole somewhat reluctantly, and after much persuasion and threatening on the part of Jagat Mali, and just similarly to the case of Jagat Mali she had, on the 27th February, three days before, tried to throw all the blame on her lover, and make out that she warned her husband against him. **[64]** On the 9th March followed, as in Jagat's case, the usual retractation and accusations against the police, and finally the plea of not guilty at the trial.

"Against Jagat Mali, apart from any statements of accused persons, it is abundantly clear from the evidence of witnesses that he was on terms of improper intimacy with Udoy Tara, living actually a year or so at the house with her and sleeping in the same *ghur* (room). He was related to her, a son of a cousin of her's apparently, but the evidence of his improper connexion with her is quite distinct and conclusive on the point.

"Jagannath witness and Lakhi wife of Ramraton Mali prove that at noon on the Monday, 26th February, Jagat Mali had his food at the house of Rutton Mali at Kandipur, *i.e.*, in the same *bari* as that in which lives Jagannath, Sharat Mali's close neighbour. But a more important piece of circumstantial evidence is that of Ram Kumar Mali who tells, and there is nothing at all to make one distrust him, how on the Tuesday morning, just after the murder before the sun had risen, Jagat Mali arrived at his house at Kartola, saying he had come from Kandipur, and Kandipur is four or five hours journey from Kartola.

"If all the facts are considered, that Sharat Mali had no motive at all to kill Brindabun Mali; that Jagat Mali was the woman Udoy Tara's lover; that she was most unhappy; that the injuries inflicted on Brindabun Mali were evidently the result of cruel blows dealt by a vigorous hand, and Jagat Mali is plainly a strong man – if these things are taken into account, together with the other circumstances I have noted, including the statements of Jagat Mali himself, the statement of Udoy Tara may be left out, it cannot be doubted, I am of opinion that the murder of Brindabun Mali was committed by Jagat Mali.

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"As to Udoy Tara, she was charged with murder, s. 302, Indian Penal Code, though abetment of murder more accurately describes her offence according to the Code. Against her, the circumstances are as strong as could be desired also, I believe. She was made a witness before the committing Magistrate, and a pardon was tendered to her. At the trial, she was the first witness examined, and it was quite evident that she broke [65] the conditions of pardon. Accordingly she was put on her trial and the pardon withdrawn. That she was at the house of Sharat Mali on the night of the murder, and went out and helped to bring the murdered man into the house, there can be no sort of doubt after the evidence. The circumstances proved against her all point to the part she took in the murder, as described at the commencement of this judgment. Her own statements help to make her guilt of abetment of the murder still more certain.

"There is a point of law to mention. Just at the close of the whole trial, before the arguments, it was said in defence that Udoy Tara should not have been tried together with Jagat Mali. A similar case had not arisen before in my experience, I believe; and I referred to the rulings cited.

"These were the cases: *Queen* v. *Petumber Dhoobee* (1) and *In re Joyudee Paramanick* (2).

"I would have of course been ready to stay proceedings against Udoy Tara, so as not to prejudice either her or Jagat Mali—the representations to me were made on behalf of the latter—had I believed the objections to the trial of both together in this instance to be at all weighty. But really the circumstances of the present case in no way, I think, necessitated any change of procedure on my part.

"The evidence Udoy Tara gave on the trial, after the various statements she had made before, could not reasonably, I believe, be thought to prejudice the assessors against her in considering her case. That evidence had no bearing whatever on the trial; and the assessors, one expressly and the other as certainly, based their opinions on the statements of accused recorded by the Deputy Magistrate. Moreover, there was no other evidence taken before her own, and she therefore had every opportunity to cross-examine. The evidence of Udoy Tara taken before the committing Magistrate has been put in as evidence in the case no doubt; and such evidence can apparently legally be used in accordance with the provisions of s. 288 of the Criminal Procedure Code. However I have not thought it worth while hitherto to refer to this evidence, and indeed it may be disregarded as far as its bearing on [66] the proof of the charges concerned. It had no influence with me, and the case was abundantly clear without it.

"The two reported cases I have referred to have been considered in their bearing on the present trial in the above remarks, and I believe I may now say that the prisoners have not been subjected to any unfair treatment.

"Some other cases I have myself, read, of later date, namely, *Queen-Empress* v. *Sudra* (3), *Queen-Empress* v. *Mulua* (4), and *Queen-Empress* v. *Rama Tevan* (5), have more or less connexion with the point under discussion; but I think I have sufficiently shown that my procedure in this particular trial has been unobjectionable.

"It might perhaps be thought that the evidence given to the Deputy Magistrate was not subject to Udoy Tara's cross-examination; but, as a

(1) 14 W. R. Cr. 10. (2) 7 C. L. R. 66. (3) 14 A. 336.
(4) 14 A. 502. (5) 15 M. 352.

fact, all the material witnesses had been examined before she became a witness also, under pardon, and so by her as accused, these witnesses were liable to be cross-examined. I say all the material witnesses, because the only witness examined on the same day as she was examined, the 24th April, were two men who were called to prove facts connected with the discovery of blood on Udoy Tara's clothes—a matter which had no bearing whatever on the case as it happened.

"I have not written of these blood stains purposely hitherto, as they have not in the least affected the trial. It was merely shown by chemical analysis that an old torn *sari* found in Udoy Tara's room was stained with blood. But this fact has no significance whatever, when it is remembered that the woman carried the man in from the bamboos; and held his head which was bleeding profusely. That the dress worn by her was stained by blood at the very time of the commission of the murder can by no means be ascertained.

"The evidence, therefore, against the accused persons Jagat Mali and Udoy Tara stands as I have before explained.

"The assessors both held the accused to be guilty, Jagat Mali of murder and Udoy Tara of abetment of murder, s. 302, [67] Indian Penal Code, and s. 302/109, Indian Penal Code, respectively.

"I do not think I need give any reasons for holding that Jagat Mali should be sentenced to death.

"As to Udoy Tara there are, I believe, some indications that she would have killed herself and not her husband, had she not been led away by the influence of her lover. Without enlarging here on the extenuating circumstances I may, I believe, say that the evidence, together with what I have already written in this judgment, discloses the fact that the capital sentence is not necessary in the case of the woman. Agreeing with both the assessors, I find Jagat Chandra Mali guilty of murder of Brindabun Mali, and I direct that he be hanged by the neck till he is dead, s. 302, Indian Penal Code. Agreeing with both the assessors, I find Udoy Tara guilty of abetment of the murder of Brindabun Mali, and I sentence her to transportation for life, under ss. 302 and 109, Indian Penal Code."

The case was accordingly referred to the High Court for confirmation of the sentence of death on the first accused, and both the accused appealed.

Mr. *M. Ghose*, appeared for the prisoner Jagat Chandra Mali.

No one appeared for Udoy Tara.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*), for the Crown.

Mr. *Ghose.*—The procedure adopted by Sessions Judge is wholly illegal and must have seriously prejudiced both the prisoners. The Judge had no jurisdiction to try Udoy Tara then and there without a valid commitment, (s. 193 of the Civil Procedure Code). This has been the law since the Code of 1861.

The earliest case on the point is that of *The Queen* v. *Petumber Dhoobee* (1), in which Phear, J., points out how such a procedure must necessarily prejudice both the prisoners. *In re Joyudee Paramanick* (2), under the Code of 1872, the point was not expressly decided, but the observations of Field, J., are important. That case was not argued. (The other cases cited by Counsel on [68] this point are all referred to in the judgment). The first information given to the police is not admissible. The

(1) 14 W. R. Cr. 10. (2) 7 C.L.R. 66.

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deposition of Udoy Tara herself cannot be treated as ēvidence under s. 288 of the Code. Further, she was not cross-examined before she was made an accused. The confessions on the face of them are not voluntary and are wholly unreliable. Besides the confessions there is no reliable evidence. [Observations of Straight, J., in *Queen-Empress* v. *Babu Lal* (1), and those of Cave, J., in *The Queen* v. *Thompson* (2), were referred to)]. The burden of proving that the confessions were voluntary was on the prosecution.

The Deputy Legal Remembrancer admitted that the authorities on the question of the legality of the procedure were against him, but submitted that the case against Jagat Chandra Mali turned on the confessions which, if believed to be true, were conclusive, and that the accused had not shown sufficient grounds for their rejection.

The judgment of the High Court (BEVERLEY and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The appellant Jagat Chandra Mali has been convicted of murder and sentenced to death by the Sessions Judge of Tipperah, and the proceedings have been referred to this Court for confirmation of the sentence under the provisions of s. 374 of the Code of Criminal Procedure.

The appellant Udoy Tara has been convicted of abetment of murder and has been sentenced to transportation for life.

The deceased was the husband of the female accused Udoy Tara, and the medical evidence shows, beyond all reasonable doubt, that, on the night of Monday, the 26th February last, he was done to death by being beaten severely on the head and upper portion of the body. The case for the prosecution is that the male accused had an intrigue with the deceased's wife Udoy Tara, and that, on the night in question, the deceased was enticed out of his house by the female prisoner when he was set upon by Jagat Chandra, and with the woman's assistance was beaten to death. The case may be said to rest entirely upon the so-called confessions of the accused.

[69] Before going into the merits, we must point out a grave irregularity which was committed in the trial of the case in the Court of Session which alone, as we think, would suffice to prevent us from affirming the present conviction in the case of either of the accused.

It appears that, during the preliminary inquiry before the Deputy Magistrate, the female accused Udoy Tara was on the 24th April offered a pardon under the provisions of s. 337 of the Code, and the tender having been accepted, her deposition was recorded, and she was sent up to the Court of Session as a witness for the prosecution.

In the Court of Session she was the first witness examined, and as she deviated from the statements made by her to the Deputy Magistrate, the Sessions Judge seems to have stopped her examination, made an order that she should be tried for the offence in respect of which the pardon was tendered, and then and there to have transferred her from the witness-box to the dock. At the same time her name was inserted in the charge by the Sessions Judge, and the trial proceeded as against both the accused jointly.

Now, it has been pointed out in several reported cases that this procedure is irregular and unfair to the accused. In the case of *The Queen* v. *Petumber Dhoobee* (3) which was a case tried when the Criminal

(1) 6 A. 509. (2) (1893) L.R. 2 Q. B. 12 (3) 14 W.R. Cr. 10.

Procedure Code of 1861 was in force, Phear, J., commented upon the unfairness of such a proceeding and pointed out how it tended to prejudice, not only the approver himself on his trial, but also those with whom he was being jointly tried. In the case of *In re Joyudee Paramanick* (1), which was a case very similar to the present, and was decided when the Code of 1872 was in force, the Court expressed the opinion that the Sessions Judge would have exercised a wiser discretion had he refrained from trying the approver along with the other accused. In *Queen Empress* v. *Sudra* (2) the same view was taken by Knox, J. In *Queen-Empress* v. *Malua* (3) the accused Malua had, along with others, been committed to the Court of Sessions upon certain charges and had pleaded guilty. After two witnesses had [70] been examined for the prosecution, the Sessions Judge tendered a pardon to Malua, who was then put into the witness-box and examined as a witness. The Judge being of opinion that his evidence was false, then revoked the tender of pardon and put Malua back from the witness-box into the dock and proceeded with the trial as against him and the other three accused. In regard to this procedure the High Court remarked : " Whether or not that proceeding was illegal, it is quite clear to our minds that it might most seriously prejudice the defence of a man who was taken out of the dock in the middle of a trial to give evidence upon a tender of pardon, to put him back in the dock after his evidence had been taken and to proceed to try him as if the tender had never been made. It would be most difficult for a man placed in such circumstances to deal with the evidence or to defend himself and put forward any points which might be in his favour with effect." And having a doubt as to the legality of the procedure adopted, the Court set aside the conviction of Malua and ordered him to be re-tried.

In the case of *Queen-Empress* v. *Rama Tevan* (4) the facts were very similar to those in the present case. Two approvers had been sent up to the Sessions Court as witnesses. The Judge revoked their pardon and proceeded at once to try them along with the other accused. The High Court held that the approvers not having been committed for trial the action of the Judge was *ultra vires*. The Court, therefore, set aside the conviction of the approvers and directed a fresh trial of the other accused on the ground that they had been prejudiced by the action of the Judge. As regards the approvers the Court said: " By s. 349, Act X of 1872, a Sessions Judge was empowered to commit or direct the commitment of any person who, having accepted an offer of pardon, did not conform to the conditions under which the pardon was tendered, but the present Code contains no such provisions, and in s. 339 it is merely laid down that such a person may be tried for the offence in respect of which the pardon was tendered ; but s. 193 provides that no Court of Session shall take cognizance [71] of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered." And, further on, the Court say : " Even supposing that the Sessions Judge had had powers to try the two approvers, we concur with the learned Judges of the Calcutta Court—*The Queen* v. *Petumber Dhoobee* (5) and the *Queen* v. *Bepro Dass* (6)—that it is unfair to put an approver, whose conditional pardon has been cancelled, on trial along with the other prisoners, in the course of whose trial such approver has given evidence, and that the proper course is to defer taking action against the approver until the

(1) 7 C.L.R. 66. (2) 14 A. 336. (3) 14 A. 502.
(4) 15 M. 352. (5) 14 W. R. Cr. 10 (6) 19 W. R. Cr. 43.

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conclusion of the trial then proceeding." See also the case of *Rama Varma Raja* v. *The Queen* (1).

For the reasons given in the two cases last cited we are of opinion that the course pursued by the Sessions Judge in this case was not merely irregular, but that the trial of the appellant, Udoy Tara, was altogether illegal. Section 193 of the Code now in force runs as follows: "Except as otherwise expressly provided by this Code, or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf." We are not aware of any provision either in the Code itself or in any other law now in force, and Mr. Leith has been unable to refer us to any such provision, which would authorise the Sessions Judge in this case to take cognizance of the offence of murder and to try Udoy Tara for that offence without a commitment duly made by a competent Magistrate. That being so, we must set aside the conviction of Udoy Tara on the ground that the Sessions Judge had no jurisdiction to charge and try her for the offence of murder. In the view we take of the matter it is almost unnecessary to add that she was unfairly prejudiced by the course which the Sessions Judge followed in suddenly putting her on her trial without notice, without any preliminary enquiry and without an opportunity being allowed her to retain legal advice or to adduce evidence in her defence.

[72] But we are further of opinion that the other accused Jagat Chandra was also prejudiced by the course which the Judge thought fit to take in this case. Udoy Tara having been tried along with Jagat Chandra, certain statements of the former have been put in evidence, which would not have been admissible in evidence against Jagat Chandra had he been tried alone. Moreover, Udoy Tara having been sent up by the committing Magistrate as a witness against him under s. 337 of the Code, Jagat Chandra had the right to cross-examine her, which right was apparently not allowed him.

The statements of Udoy Tara used at the trial were:

(I) Her statement to the police on the 27th February, Ex. X.

(II) Her statement to the Magistrate on the 2nd March.

(III) Her statement to the Magistrate on the 9th March.

(IV) Her deposition before the Magistrate on the 24th April.

It appears that the woman was also examined as a witness by the Deputy Magistrate on February 27th and February 28th, but these depositions were apparently not put in evidence at the trial.

The statement of the 27th February (Ex. X) was apparently intended to be used as the first information in the case. But it was clearly not the first information. The evidence shows that the first information was given to the police by Sharat Chandra at the thanna. That information, though admittedly reduced to writing, has been suppressed. Udoy Tara's statement (Ex. X) was made by her at her house after the arrival of the police. It was the statement of a witness, not of an accused person, and Udoy Tara not being a witness at the trial, we are not aware of any provision of the law under which it was admissible against Jagat Chandra. On the contrary, s. 162 of the Code distinctly says that such statement shall not be used as evidence against the accused. Udoy Tara's statements of the 2nd and 9th March were those of an accused person, and could only be taken into consideration as against Jagat Chandra,

(1) 3 M. 351.

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under s. 30 of the Evidence Act, if the two accused were being tried jointly for the same offence. As we are of opinion that the trial of Udoy Tara in the absence of any [73] commitment by a Magistrate was bad in law, it follows that the statements (II) and (III) were not admissible against Jagat Chandra.

Nor in our opinion was the deposition of the 24th April (IV) admissible in evidence against Jagat Chandra. If it is contended that the deposition was treated as evidence under the provisions of s. 288 of the Code, the answer is obvious that it ceased to be evidence as soon as Udoy Tara was withdrawn from the witness-box and placed in the dock. Moreover, no opportunity was given to Jagat Chandra to cross-examine Udoy Tara upon this deposition. The admissibility of such depositions was doubted in the following cases, namely: *In re Joyudee Paramanick* (1) and *Nanha Mulla* v. *Empress* (2), but as the matter was not argued in those cases the question was not decided. In the case of *Queen-Empress* v. *Rama Tevan* (3) the point was raised, and it was contended that the depositions would have been admissible had the other accused been allowed to cross-examine upon them. The Court did not expressly decide the point, but it seems to have been admitted that, in the absence of the opportunity for cross-examination, the depositions were inadmissible.

If, on the other hand, the deposition be regarded as a confession, we think that it was clearly inadmissible against Jagat Chandra, not only for the reasons given above, but also because it was irrelevant under s. 24 of the Evidence Act, it having been made after the tender of pardon.

For these reasons we think that the statements of Udoy Tara were not admissible in evidence against Jagat Chandra, and we must, therefore, consider, having regard to s. 167 of the Evidence Act, whether there is sufficient evidence against him, independently of those statements, to justify us in affirming the conviction.

In convicting Jagat Chandra, the Sessions Judge has mainly relied upon his confession of the 1st March, but before considering that confession, it may be well to consider certain other evidence to which the Judge attaches some importance. The [74] Judge thinks it abundantly proved that an intrigue existed between the two accused. We are not at all satisfied upon the evidence that any such intrigue really existed. In the first place it is improbable; the two persons are related to each other and the woman is much older than Jagat Chandra. Then the evidence respecting it is all hearsay, extremely vague, and not in our opinion such as would be forthcoming had any such intrigue really existed. The evidence of Sharat Chandra in particular on this point is very unsatisfactory. If an intrigue existed, he must have known of it, yet he denies all personal knowledge of it, and contents himself with saying: "People say so." The statements of the accused themselves are contradictory as to the period of this intimacy. It is not improbable that Jagat Chandra, while in the service of Mr. Delawnay, lived in the same hut with Sharat and the deceased and his wife, but that fact is not sufficient in itself to raise the inference of an intrigue between him and the wife of the deceased.

Then it appears that after leaving the service of Mr. Delawnay Jagat went to live at Kartola, some four or five hours' journey from Kandipur, where the deceased lived, and it was at Kartola that he was arrested on the Wednesday. But evidence is given that he was seen in Kandipur on the Sunday and the Monday, and that he returned to Kartola early on

(1) 7 C.L.R. 66. (2) 13 C.L.R. 326. (3) 15 M. 352.

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the Tuesday morning. It may be that he was in Kandipur on the Sunday, though it is to be observed that there is a contradiction between the evidence of Sharat Chandra and of Obhoy Chandra as to where he took his meal that night. As regards the Monday, Lakhi, the wife of Ramratan Mali (who is not called), says that Jagat ate his midday meal that day at their house, and in this she was corroborated before the Sessions Court by Jagannath Mali, who lives in the same *bari*. But before the Magistrate Jagannath said that he had not seen him there after the Sunday. We cannot, therefore, attach much weight to this evidence, any more than to that of Ramkumar Mali, who deposes to the fact of Jagat's arrival at Kartola early on the Tuesday morning.

Kandipur, where the murder took place, is about a mile distant from the Comilla Police Station. The Sub-Inspector states that information was brought to the Police Station by **[75]** Sharat Chandra at about 8 A. M. on the 27th February. He recorded his statement, but did not make it the first information inasmuch as no one was charged with the crime. He then went to Kandipur, and at 9-30 A M., recorded the statement of Udoy Tara (Ex. X). Udoy Tara was examined the same day as a witness by the Deputy Magistrate, her statement being the same as in Ex. X, namely, that she had seen Jagat Chandra throw her husband's body into the bamboo clump. On the 28th Jagat Chandra was arrested at Kartola, and was brought in to the Sub-Inspector. The Sub-Inspector says he did not arrive till 8 P.M., but the same night he was sent to a Magistrate in order that his statement might be recorded, as " he had almost confessed." A statement was accordingly recorded that night by Deputy Magistrate Harendra Lal Kastagiri, in which Jagat charged not himself, but Sharat and Udoy Tara with the murder, but which statement is certified as a free and voluntary confession. Jagat remained in the hands of the police that night, and next day, namely, March 1st, he made another statement to another Deputy Magistrate, Bissessur Bhuttacharji, in which he charged himself and Udoy Tara with having been concerned in the murder. It is on this confession that we are asked to affirm the conviction.

After that statement had been recorded, Udoy Tara was also charged with the crime, and on the following day (March 2nd) she made another statement before the Deputy Magistrate, in which she fully implicated Jagat and herself. But at the close of her examination occur the following significant questions and answers :—

"Q.—Why did not you state all these when you previously gave deposition to me ?

A.—So long I did not say ; he threw everything upon me, and I therefore said.

Q.—How could you know that everything was thrown upon you ?

A.—At that time in the jail he said to the Court Babu that Sharat and his sister killed him. Lastly, he changed his version and said Sharat did not know anything, he and I killed him.

[76] Q.—Whether the statement made by you before is correct or the statement made by you now is correct ?

A.—The statement made by me now is correct.

Q.—Has anybody frightened you or tortured you to make such statements ?

A.—No.

Q.—Whether the Court Babu and Inspector Babu went to the jail ?

A.—Both Court Babu and Inspector Babu went to the jail."

From these answers it is clear to us that the police were inducing the two accused to confess by playing them off against each other. 1894 JULY 17.

On the 9th March both Jagat Chandra and Udoy Tara retracted their confessions, stating that they had been made under fear of the police. Now, what we have to decide is, whether Jagat's confession of March 1st was such a free and voluntary admission of his guilt that we should be justified in acting upon it and upholding his conviction for murder upon the strength of it, and it is with a view to this consideration that we have thought it necessary to set out at length the circumstances under which the confession was made. And upon a full consideration of these circumstances and of the various statements made by the two accused from time to time, we are of opinion that Jagat's statement of March 1st was not such a spontaneous admission of his guilt that we should be justified in acting upon it. It seems clear form the hot haste in which these two persons were placed before the Magistrate at different times between the 27th February and the 2nd March that the police were anxious to elicit some statement from one or both of them which should serve as a confession. There is also reason to believe, as we have said above, that the police were playing off one accused against the other, so as to induce them to charge each other with the crime. Then, if we look at the statement itself, we do not think it bears the impress of being genuine and spontaneous. A few hours before, Jagat had made a totally different statement, equally certified to be a true and voluntary confession, in which he had charged Sharat with the murder, and although in the statement of March 1st he [77] does say that it was he himself who beat the deceased to death, the statement is mainly occupied with what Udoy Tara did and is so framed as to throw the real blame on her. The statement is not corroborated in any way. Nothing was discovered or brought to light in consequence of it, and it was retracted on the next occasion on which Jagat Chandra was placed before the Magistrate.

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Under these circumstances, we feel that we cannot safely act upon this confession, and there being no other evidence upon which Jagat Chandra could be convicted, we have no alternative but to reverse the finding of the Sessions Judge and to acquit him.

We, accordingly, reverse the conviction of both the appellants. We acquit Jagat Chandra, and we direct that both the accused be released.

H. T. H. *Conviction set aside.*

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Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

PERSHAD SINGH AND OTHERS (*Plaintiffs*) *v.* RAM PERTAB ROY (*Defendant*).* [11th September, 1894.]

Bengal Tenancy Act (*VIII of* 1885). *s.* 155—*Suit for ejectment—Notice, sufficiency of—Omission from notice of requisition on tenant to pay compensation—Alternative relief.*

The words of s. 155 of the Bengal Tenancy Act "and in *any* case to pay reasonable compensation," &c., mean in *every* case; and a notice not containing a requisition to the tenant to pay such compensation is insufficient to support a suit for ejectment brought under that section.

Where the suit was for ejectment from certain land, but the plaint contained other prayers, namely, for a declaration that the defendant had no right to build houses on the land, and for an injunction on him to remove houses he had built thereon and the suit for ejectment failed from the insufficiency of the notice under s. 155, the Court held, that the plaintiff was not entitled to a declaration or injunction as asked for.

[D., 30 C. 1063.]

[78] THIS was a suit for ejectment of a tenant after notice under s. 155 of the Bengal Tenancy Act. The facts were stated as follows in the judgment of the Munsif:—

"The plaintiff Raja Pershad Singh is proprietor, and the other plaintiffs his lessees, of the partitioned share of *mouza* Bhagwanpur in which the land in dispute is situate. The defendant Ram Pertab Roy is the admitted tenant of the land. Raja Pershad says the tenant's right is one of occupancy, and none other than that of holding and cultivating the land in question, and the tenant has no right to use it for building purposes. He complains that the defendant has been since 1295 (1888) using it by building houses, and letting them on rent, and has thereby rendered the land unfit for the purposes of cultivation for which it was originally let to the defendant and himself.

"In order to sustain a suit for ejectment, the plaintiff states that under s. 155 of the Tenancy Act he caused a notice to be served on the defendant, Ram Pertab Roy, specifying in it that the defendant should remove within one month from the date of service the houses he has built in contravention of the purpose for which the land was let; that the notice was served on the 14th January 1891, and the defendant has not removed them. He therefore states that his cause of action has arisen from the 15th February 1891, *i.e.*, the date following the day on which the one month's time expired.

"Upon these statements of fact the plaintiff asks the following relief:—

"(*a*) That it be declared that the defendant has no right to build houses on the land in question, and to let them stand thereon;

"(*b*) That on determining the first prayer in the plaintiffs' favour the defendant be directed, within a time fixed by the Court, to remove the houses, and reduce the land to its former condition;

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* Appeal from Appellate Decree No. 2297 of 1893, against the decree of Babu Amirto Lal Chatterjee, Subordinate Judge of Tirhoot, dated the 30th of September 1893, affirming the deeree of Babu Krishna Nath Roy, Munsif af Hajipur, dated the 12th of September 1891.

"(*c*) That if the defendant do not remove the houses he be ejected from the land;

"(*d*) That the plaintiff be adjudged costs of the suit."

Six issues were raised on which the Munsif held that the suit was not barred by limitation; that the notice was duly served, but was defective in not asking for compensation, and therefore not sufficient to support the action, and was moreover not served by the landlord, but by the proprietor; that the houses which it was sought to remove were built at the time (1295) as stated by the plaintiff, and not nine years before suit, as stated by the defendant; that the defendant was not holding at fixed rates, and had not the right to use the land as he pleased; that the tenancy was one for agricultural, and not for building purposes, but that **[79]** the defendant's use of it had not deteriorated, but rather improved, the holding. On his decision on the second issue he held that the suit must be dismissed.

On appeal the Subordinate Judge said:—

"The notice so given did not require the tenant to pay compensation for the misuse or breach complained of, nor did the plaintiffs in the present suit ask compensation from the defendant for the misuse or breach complained of. The first Court has dismissed the suit on the following grounds: *First*, that the notice is defective, because it does not require the tenant to pay compensation for the misuse or breach; *second*, that it is bad inasmuch as it was not served by the landlord, but by the proprietor. The plaintiffs who are the appellants before me contend that neither of the said grounds is sufficient.

"The question which I am now to try is whether the grounds relied upon by the first Court are enough to warrant the Court in dismissing the suit."

The Subordinate Judge then went on to hold that, though he was of opinion that the plaintiff was a "landlord" for the purpose of serving the notice, yet the notice was defective under s. 155 of the Tenancy Act in not asking for compensation, and that the suit must therefore be dismissed. He did not touch on any of the other issues in the case.

From this decision the plaintiffs appealed on the grounds that the notice was sufficient under s. 155, and that at any rate the suit ought not to have been entirely dismissed, but that the Courts should have given the plaintiffs such relief and declarations as they were entitled to on the findings in the case.

Mr. *Jackson*, Dr. *Rash Behari Ghose*, and Babu *Uma Kali Mukerjee*, for the appellants.

Moulvi *Mahomed Yussoof*, for the respondent.

The following judgments were delivered by the Court (TREVELYAN and AMEER ALI, JJ.)

JUDGMENTS.

TREVELYAN, J.—In this case the suit was brought by a landlord against his tenant praying (*a*) that it may be declared that the defendant had no right to build houses; (*b*) upon determination of the above prayer, the defendant may be ordered to remove the houses within a fixed time and reduce the land to its former condition; (*c*) if the defendant fail to remove the houses within the fixed time, he may be ejected from the land and *khas* possession awarded to plaintiff. The first question that was tried by the **[80]** learned Munsif was as to whether the plaintiff had complied with the provisions of s. 155 of the Bengal Tenancy Act, and had given the notice therein provided for. He came to the

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conclusion that the notice was defective on the ground that the plaintiff did not therein ask for compensation for the breach. He also considered that on other grounds it was defective. There were raised before him, besides the first issue which refers to limitation, a question which does not arise here, a second issue as to notice. The following was the third issue, namely: "Were the houses asked to be removed built in Magh 1295 and Chait 1297 as stated in the plaint, or nine years ago as stated by the defendant?" That issue he decides in favour of the plaintiff. The next issue is the fourth issue: "Is the defendant's holding *mourasi*, *i.e.*, at fixed rates? If so, has he a right to use the land in any way he pleases?" That issue he decided also in favour of the plaintiff. The next issue is: "For what purpose was the land first granted to the defendant? Is the building of the *ghur* detrimental to the object for which the lease was first granted? Is the value of the holding deteriorated by these buildings?" He comes to the conclusion on that issue that, instead of the defendant having caused the value of the holding to deteriorate he has, as a matter of fact, improved it. He declines therefore to give the plaintiff any relief. There was an appeal by the plaintiff to the Subordinate Judge, who only deals with the question arising under the Bengal Tenancy Act and on the question as to the omission of a demand for compensation in the notice, the Subordinate Judge agrees with the view taken by the Munsif. He does not agree with him as to the other questions regarding the notice which it is not necessary for us to consider now. He says nothing about any other question. It does not appear before us whether or not any other question was argued before him.

The first and most important question which has been argued before us arises under s. 155 of the Bengal Tenancy Act. That section provides: "(1) a suit for the ejectment of a tenant on the ground—(*a*) that he has used the land in a manner which renders it unfit for the purposes of the tenancy; or (*b*) that he has broken a condition on breach of which he is, under the terms of the contract between him and the landlord [81] liable to ejectment—shall not be entertained unless the landlord has served, in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and where the misuse or breach is capable of remedy requiring the tenant to remedy the same, and in any case to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request." The question really turns upon the meaning of the words "and in any case;" if that means in any case whatever, it follows that there being statutory prohibition unless the notice exactly complies with the statute the Judge would be right. The argument of learned counsel comes to this that, if it was a case where no compensation could possibly be ascertained, it would be unreasonable to expect the landlord to give notice with regard to it. He says that in this particular case, with regard to what was alleged to have been done, it was impossible to ascertain the damages. Of course that argument would be very difficult to accept, if the Legislature meant *every* case, because we are bound to follow the Act. In support of this contention, our attention has been called to an English statute from which the first portion of s. 155 has been taken, namely, s. 14 of the Conveyancing and Law of Property Act of 1881. The words of the first portion of that section are practically the same as those of the first portion of s. 155, but the latter portion of s. 14 of the English statute is wholly different, and is intended for an entirely different purpose from the latter portion of s. 155, which

provides for the nature of the decree. I have always thought it a great advantage where one can find an English statute resembling in its purpose and phraseology the Indian statute under discussion to get the assistance offered by the decisions of the Courts in England, but of course it is always necessary to see that these statutes are really resembling one another in their purposes and not only have an accidental resemblance in a portion of the section, which for convenience of drafting has been adopted by the draftsman of the Indian Act. There were cited before us cases which support the view taken by the learned Counsel, and there is no doubt that the case in the Court of appeal is distinctly in his favour, but here we find a difficulty in applying that case, because the first portion of s. [82] 155 is directly controlled by the second portion of it, and we do not think that it is possible to give any reason for this distinction better than that in the remarkably able judgment given by the learned Munsif. He there points out, after going into the matter, that if there should be no loss to the landlord, there should be no ejectment or claim for compensation, and if, as a matter of fact, the landlord does not lose any money by this use of the land apart from the removing of the property, the result would be that there would be no ejectment. However that may be, there are the words of the Act. Whether it be difficult or easy to follow it in the notice, we think it clear that the omission of a demand for compensation in the notice prevents this suit being entertained. So much for s. 155. It is also argued that even if an action for ejectment does not lie, the plaintiff is entitled to an injunction. There is no doubt that this suit is framed as really a suit for ejectment; the earlier portions of the prayer to which I have referred are merely ancillary to the question of ejectment, and on this question of notice the case has been argued. It does not appear that in the Subordinate Judge's Court anything else was suggested, and in the Court of the Munsif, who has tried all the issues, it does not appear that he was asked to give an injunction. It is necessary to see what the suit really is. It was a suit for ejectment and in that the plaintiff has failed. The appeal is dismissed with costs.

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AMEER ALI, J.—This was a suit between a landlord and a tenant. There is no question that the defendant is an occupancy ryot holding lands within the zemindary of the plaintiff. The plaintiff's case is that the defendant has constructed upon his holding certain buildings which have rendered the land held by him unfit for cultivation. That is set out in para. 5 of the plaint. The plaintiff states further in para. 6 that on the 14th of January 1891 he served, under s. 155 of the Bengal Tenancy Act, a notice requiring the defendant to remove the houses and bring the land to its original state within one month from the date of service thereof, failing which a suit would, on the expiration of the time mentioned, be brought by the plaintiff to cancel the defendant's tenancy, and to eject him from his land. The first Court held that the notice did not comply with the requirements of s. 155, [83] which was a condition precedent to the institution of any suit under that section, and accordingly dismissed the plaintiff's action. The Subordinate Judge on appeal expressed himself thus:—

"The first Court has dismissed the suit on the following grounds:—

"*First.*—That the notice is defective, because it does not require the tenant to pay compensation for the misuse or breach.

"*Second.*—That it is bad inasmuch as it was not served by the landlord, but by the proprietor.

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"The plaintiffs, who are the appellants before me, contend that neither of the said grounds is sufficient.

"The question which I am now to try is whether the grounds relied upon by the first Court are enough to warrant the Court in dismissing the suit?"

It is clear, therefore, that there were two points dealt with by the Subordinate Judge in his judgment—(*i*) whether the notice upon which the suit was founded was materially defective; and (*ii*), whether the view of the Munsif that the notice was not by the landlord was correct. The Subordinate Judge does not seem to have been called upon to enter into any other question. He held that it was indispensable under s. 155 of the Bengal Tenancy Act that the notice should contain the demand for compensation, and as compensation was not asked for the suit was bad; on the second point he thought the view of the Munsif was not correct. He held so far in favour of the plaintiff's, but on the other ground he dismissed the appeal with costs.

In special appeal two questions have been raised—one that the notice was quite sufficient. That has been dealt with by my learned colleague, and I shall not deal with it in detail. The other point urged was that even if the plaintiff was not entitled to eject the defendant he was entitled to a declaration that the defendant had no right to build houses and to let them stand in the terms of prayer (*a*) in the plaint, and that further he was entitled to an injunction in accordance with prayer (*b*). Now, as I understand s. 155 of the Tenancy Act, it seems to me to be exhaustive [84] in itself. The section may be divided into three parts. The first part of the section deals with two classes of cases, *viz.*, a case where the tenant is using the land in such a manner as to render it unfit for the purposes of the tenancy. Secondly, the case of a tenant committing a breach of the terms of the contract between him and the landlord, which renders him liable to ejectment. The plaintiffs' suit is not founded on cl. (*b*) of the section; his suit is based upon cl. (*a*), that is, that in consequence of his building these structures he has rendered the land unfit for the purposes of the tenancy, and that is what is set forth in para. 9 of the plaint. Then the section describes how the landlord should proceed, in order either to have the lands brought back into the original condition in which they were, or to get relief for the breach of the conditions of the contract; it prescribes that he should serve a notice on the tenant, specifying the precise and particular misuse of the land under cl. (*a*) or of the breach under cl. (*b*), and if these two acts are capable of being remedied, requiring him to remedy the same, and in any case asking him to pay reasonable compensation for either of these acts under cl. (*a*) or cl. (*b*). Then the section goes on to provide that if the tenant fails to comply with that demand within a reasonable time, namely, with the requisition asking him to remedy the breach or to pay compensation, the landlord would be entitled to bring a suit, the procedure for which is laid down further in sub-ss. 2, 3 and 4. Upon such a suit being brought if the conditions precedent have been complied with, the Court has the power to make a decree in the following way, namely, it may make a decree declaring the amount of compensation reasonably payable to the landlord, and declaring whether in the opinion of the Court the misuse or breach is capable of being remedied. If it is capable of being remedied the Court is to declare and direct that the defendant should remedy the same. In the other case the landlord would be entitled only to compensation. Sub-s. 4 further provides that, "if the

defendant within the period or extended period (as the case my be) fixed by the Court under this section pays, the compensation mentioned in the decree, and where the misuse or breach is declared by the Court to be capable of remedy, remedies the misuse or breach to the [85] satisfaction of the Court, the decree shall not be executed." The result, therefore, is that if the tenant pays the compensation for which he has been declared liable he cannot be ejected; if the misuse or breach is capable of being remedied, and he does not comply with the injunction of the Court to remedy it, he is liable to be ejected, and if he fails to pay the compensation awarded he is of course liable also to ejectment; but where he pays the compensation, or where the act is capable of being remedied, and he has remedied it, there is no ejectment. It seems to me, looking at the scope of the section and the character of the Tenancy Act which covers all disputes between landlords and tenants, that any action of the landlord must proceed under and be governed by the rules laid down by the Legislature in the Tenancy Act, but, as already pointed out, it is not necessary to go into these questions, because the case of the plaintiff was really one for ejectment; he gave a notice for ejectment and asked for ejectment ; and, although there were other prayers in the plaint, they were merely ancillary to the prayer for ejectment. I quite agree with the view that a demand in the notice for compensation was necessary. English cases on the construction of English Statutes are of great assistance, sometimes in construing acts of the Indian Legislature where the statutes are in *pari materia*, but excepting a verbal similarity between a portion of s. 155 of the Tenancy Act and a portion of s. 14 of the English Statute, which was referred to in argument, they do not seem to me to run on parallel lines. I agree, therefore, in dismissing the special appeal with costs.

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J. V. W. *Appeal dismissed.*

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PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

PRIT KOER (*Plaintiff*) v. MAHADEO PERSHAD SINGH AND OTHERS (*Defendants*). [14th June and 14th July, 1894.]

Onus *of proof—Hindu law—Joint family—Evidence as to the continuance of the joint holding of property—Inheritance and survivorship under the Mitakshara Law.*

[86] A daughter in the absence of sons claimed to inherit, after the deaths of her father's widows, estate which she alleged to have belonged to him separately. This estate had been at one time in his possession jointly with his only brother, they having been members of a joint family under the Mitakshara. On the death of one of the brothers, who died before the claimant's father leaving sons, the latter became entitled thereto jointly with the survivor. In order to establish this claim to inherit her father's share on his subsequent death, it was held that it was for her to adduce evidence that there had been a separation between her father and his co-sharer or co-sharers. As the evidence stood, the inference was that the previous joint holding had continued till her father's death.

[R., 11 O.C. 381 (392).]

APPEAL from two decrees (1st September 1890) of the High Court, reversing a decree (31st August 1888) of the Subordinate Judge of Patna.

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On this appeal by the plaintiff, a daughter claiming to inherit the estate of her deceased father in the absence of sons, the question was whether that estate was held by him at his death as his separate estate, or was held by him as a sharer in family estate jointly with the sons of his deceased brother. The property consisted of four entire villages, with shares in two others, all in the Patna district. The plaintiff-appellant, daughter of Dharam Singh, who died in 1843, claimed to inherit them as having been her father's separate estate, in accordance with the Mitakshara. He left two widows, one of whom, Bhup Koer, the plaintiff's mother, died in the year 1875, the other widow, Chowrasu, having died before her without children, and it was alleged in the plaint but disputed in the case, that the widows had title to and possession of the property in question, for their estates for life. The daughter, Prit Koer, brought this suit on the 21st March 1887, within twelve years from her mother's death, alleging separation of her father's possession from that of Ramdyal, his only brother, who died in 1839. The elder of two sons whom Ramdyal left, named Ram Lal, was the first defendant. He died before the hearing. Sheodyal, the second son, died before the suit was brought. Their representatives, with certain purchasers and lessees of the property in suit, who were added as parties, made up the number of the defendants-respondents. The plaint also alleged that, on the 5th March 1845, the widows Chowrasu and Bhup Koer had been induced by Ram Lal and Sheodyal to execute an *ikrarnama*, [87] which ought not to operate against the present claim. The defence mainly was that Dharam Singh had been joint in estate with his brother Ramdyal, the property in question being jointly held by them, except some part that had been acquired by Ram Lal and Sheodyal in 1854 and 1855, none of it having been separate estate; and that as joint family estate, the property was not the inheritance of Dharam's daughter, but devolved on the descendants of those nephews who had come into co-parcenary with him in his lifetime. The defence also relied on the law of limitation; but the Courts below concurred in finding on the evidence that Bhup Koer died at the date alleged by the plaintiff, *viz.*, the 3rd April 1875, so that twelve years from her death had not elapsed when this suit was commenced in 1887, and limitation, under art. 141, sch. II of the Limitation Act, XV of 1877, did not apply. The Courts below also concurred in finding that Dharam was joint with his father Doman Singh, deceased in 1806, and with his brother Ramdyal, deceased in 1839, when the village lands, forming the estate claimed, were acquired. They differed as to the subsequent separation of Dharam from his brother.

The Subordinate Judge was of opinion that there had been a separation of the property in Dharam's lifetime although he could not determine the date of it. This separation had the effect of entitling Dharam's widows to their estates for their lives, and of entitling his daughter to inherit the property. His decree was in favour of the plaintiff for one-half of her claim, or thereabouts, in all the villages mentioned in the schedule to his plaint.

On an appeal by the defendants to the High Court, the result of the judgment of a Division Bench (Pigot and Gordon, JJ.), after an examination of the documentary evidence in particular, was that they found that the joint holding, originally joint in the time of the brothers, had not been shewn to have been brought to an end. They found, upon the whole evidence, that the right inference was that the joint holding continued down to Dharam's death. They did not concur in the opinion of the first

Court (though there was much in the investigations of both Courts, in which the Appellate Court agreed with the lower Court), that the following proposition was correct, *viz.*, that certain acts on Sheodyal's [88] part, and dealings with the estate, or portions of it, after the death of Dharam purporting to acknowledge a title in one of the widows, Chowrasu Koer, went to prove that at some time, during Dharam's life, there had been a partition. On this point they differed from the conclusion of the Court below, and, reversing the decree, dismissed the suit with costs.

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On the plaintiff's appeal—

Mr. *J. H. A. Branson*, for the appellant, argued that the evidence supported the conclusion of the Subordinate Judge. He referred to the evidence showing how Chowrasu Koer, the senior widow, had dealt with the estate, as well as to the conduct and declarations of Sheodyal, and other matters inconsistent with the whole estate having already, at that time, vested in Dharam's nephews, as his survivors in a joint holding. At this stage, now that evidence had been adduced on both sides, the answer to the question, whether there had been a separation or not, was a matter of inference from the general facts, and the documentary proofs. There was enough, in favour of the affirmative regarding separation, to support the plaintiff's claim.

Mr. *R. B. Finlay, Q. C.*, Mr. *R. V. Doyne*, and Mr. *W. H. Rattigan*, for the respondents, were not called upon.

JUDGMENT.

Afterwards, on the 14th July, their Lordships' judgment was delivered by

SIR R. COUCH.—Doman Singh, who died in 1806, had two sons, Dharam Singh and Ramdyal Singh. Dharam Singh died on the 13th July 1843, leaving two widows, Mussummats Chowrasu Koer and Bhup Koer, and a daughter who is the plaintiff in the suit and the present appellant. He had no other issue. Ramdyal Singh died on the 24th December 1839, leaving two sons, Sheodyal Singh and Ram Lal Singh. Sheodyal died in 1281 F. S. (1873-74) leaving sons and grandsons, who are defendants in the suit and now respondents. Ram Lal Singh was the first defendant. He died after the filing of his written statement in defence, and is now represented by his son Mahadeo Pershad, the first respondent. Both the widows of Dharam Singh are dead. Bhup Koer the plaintiff's mother survived Chowrasu. The date of her death was disputed, the defendants alleging that she [89] died about 1865 and relying on the law of limitation. But it has been found by the first Court and the High Court that she died on the 3rd April 1875, as alleged by the plaintiff, and the suit having been commenced on the 21st March 1887, is not barred by the law of limitation.

The plaintiff claimed as heiress of her father Dharam Singh, alleging that he was separate from his nephews Sheodyal and Ram Lal at the time of his death, and that the properties in dispute were his separate properties. The family was admittedly governed by the Mitakshara law, according to which a daughter is entitled, in the absence of sons, to inherit the separate estate of her father after the death of his widows. As it could not be disputed that Dharam and Ramdyal were at one time joint in estate, and Dharam and his nephews would also be so, the *onus* was upon the plaintiff to prove that there had been a separation.

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The First Subordinate Judge of Patna in an able judgment has stated the evidence produced to prove the separation, as well as that upon the question of the date of Bhup Koer's death, and has evidently given a very careful consideration to this evidence. As to the oral evidence he says that in his opinion the oral evidence on either side was not of much worth, and could not be relied upon unless corroborated by something more reliable; that none of the witnesses appeared to him as truthful or unbiassed; that "they pretended to recollect occurrences which took place upwards of forty years ago, with as much vividness as if they had witnessed them only a few months ago;" and that the question of separation had to be decided mainly upon the documentary evidence. The High Court agreed in this.

The earliest documentary evidence is a bond dated the 15th September 1843. It purports to be made by Dusruth Lal, *mokhtar* of Mussummat Chowrasu Koer, wife of Dharam Singh, in favour of Kanhai Lal, who was then in possession of Sherpore, one of the disputed properties, under a *zurpeshgi ijara* granted by Dharam Singh. Tho bond alludes to the *ijara*, and creates a further charge upon Sherpore for the money then borrowed. It purports to be signed "Mussummat Chowrasu Koer, widow of Babu Dharam Singh. By the pen of Sheodyal Singh," and is witnessed by **[90]** Dusruth Lal and Sheodyal Singh. The next document is a *zurpeshgi ijara*, dated the 28th June 1844. It purports to be made by "Dusruth Lal, *mokhtar* of Mussummat Chowrasu Koer, widow of Babu Dharam Singh, deceased." It refers to the *ijara* by Dharam Singh, and the further charge of the 15th September 1843, and to the term of the *ijara* having expired, and renews it for a further term of three years. This is signed by Dusruth Lal only, and has the seal of Chowrasu Koer. Sheodyal neither signs nor witnesses it.

Another document is a judgment of the Additional Principal Sudder Amin of Patna, dated the 11th September 1844, in a suit by two persons against Chowrasu Koer, Sheodyal Singh and Ram Lal Singh and others for a share of the produce of a village in *mouza* Darnara Buzurg, which was stated in the plaint to have belonged to Dharam Singh. In the judgment it is stated that Chowrasu Koer had filed her answer, denying the connection of Sheodyal Singh and Ram Lal Singh with the inheritance of Dharam Singh, and that Sheodyal, for himself and as guardian of his minor brother, Ram Lal, had personally filed his answer in support of the defence of Chowrasu Koer, to the effect "that the heir of his uncle Dharam Singh, is Mussummat Chowrasu Koer, the widow of Dharam Singh, and accordingly suits have been disposed of and are pending from the zillah to the Sudder Court on the establishment of her heirship; and that the plaintiffs' suit against him, the defendant, on the allegation of being the heir of Dharam Singh, deceased, is wholly an act of selfishness on their part."

The order made in the suit is "that the suit be decreed against Mussummat Chowrasu Koer, and the remaining defendants be exempted from liability in this case."

Another document is a judgment of the Munsif of Hilsa of the 23rd August 1844, in a suit by one Fyez Ali Khan against Chowrasu Koer, Sheodyal Singh and Ram Lal Singh, and others not members of the family for the recovery of a share of the produce of property in *mouza* Mahomedpore, said to have been forcibly cut and carried away by a servant of Dharam Singh under the orders of him, and the other defendants. The defendants denied the plaintiff's title and said that the land from which the

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produce [91] was taken was in their *mouza* Mahomedpore. The Subordinate Judge says this shows that Chowrasu had some interest in that *mouza*. The suit was dismissed on the ground that the plaintiff had not proved his title, and the question, who were the heirs of Dharam Singh, appears to have been immaterial.

Another document is a decree of the Sudder Court, dated the 14th September 1844, in a suit relating to property of considerable value. Dharam Singh had instituted a suit to establish his title to it, and had obtained a decree on the 29th April 1843. An appeal was preferred against it, and after the death of Dharam, Chowrasu Koer was made respondent as his representative. The Subordinate Judge says that no attempt was made on the part of Sheodyal and Ram Lal to have their names substituted for that of Dharam, and that they would in all probability have done so, if they had been joint with him and had become entitled to the property by right of survivorship. Their Lordships do not see any weight in this, if indeed there is any such probability. Ram Lal was a minor and Sheodyal may have had reasons, other than knowing he had no title, for not becoming a respondent. If the decree of the 29th April 1843 had been reversed, he would not have been bound by the decree of the Sudder Court.

In truth the only documentary evidence of importance is the statement by Sheodyal that he and Ram Lal were not heirs of Dharam. This was made more than 40 years ago, and Sheodyal being dead, and there being no documentary evidence to explain the statement, reasons for his setting up Chowrasu Koer as the heiress of Dharam Singh can only be suggested. In Ram Lal's written statement it is said that the reasons were, the existence of litigation about the time of Dharam Singh's death, the indebtedness of Sheodyal, and attempts said to have been made by his creditors to sell properties belonging to the family. Ram Lal was a minor when the statement was made, and may have known nothing about the matter. Chowrasu Koer was set up as the sole heiress, which was untrue, Bhup Koer being equally an heiress. The statement was therefore partly untrue, and this suggests that there may have been some reason, not now capable of being proved, for setting up a sole title in Chowrasu Koer. The Subordinate Judge thought there were two alternatives : that the assertions of her [92] title by Chowrasu Koer should be regarded as *bona fide* acts, or that they should be regarded "as blinds contrived by Sheodyal Singh to deceive the world and conceal his own title" But the assertion of her title by Chowrasu Koer being partly false makes the *bona fides* of it doubtful. Then, as is observed by the High Court, the fact that there is no evidence of any documents of partition or separation of any kind is of great importance, having regard to the value of the family property, and to the family being obviously one very much versed in the conduct of business affairs. It was clear that on the death of Doman, Dharam and Ramdyal were joint in estate, and on Ramdyal's death, Dharam became joint in estate with his nephews. The plaintiff had to meet the presumption that this continued, and to prove a separation in estate. The documentary evidence—the only reliable evidence in the case—is in their Lordships' opinion insufficient to prove this, even when considered with the oral evidence of the plaintiff and her two witnesses, which it is plain the Subordinate Judge thought was of no value. The High Court on appeal by the defendants dismissed the suit, and also dismissed a cross-appeal of the plaintiff, and their Lordships will humbly advise Her Majesty

1894 JULY 14. to affirm the decree of the High Court and dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

PRIVY COUNCIL.

Solicitor for the appellant: Mr. *J. F. Watkins.*
Solicitors for the respondent: Messrs. *T. L Wilson & Co.*

C. B.

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ORIGINAL CIVIL.

Before Mr. Justice Sale.

SHAM CHAND GIRI *v.* BHAYARAM PANDAY.* [5th April, 1894.]

Abatement of suit—Civil Procedure Code (Act XIV of 1882), ss. 361, 362, 365, 371—Survival of right to sue—Application to revive suit by person whose claim is in conflict with that of original plaintiff—Parties—Substitution of parties.

The language of ss. 361 and 371 of the Code of Civil Procedure relating to abatement of a suit show that, where it is sought to revive a suit on the death of the plaintiff, the cause of action of the original and revived [93] suit must be the same, and that no fresh cause of action can be imported into the revived suit. Where a suit was brought to have it declared that the plaintiff was entitled to succeed as *mohant* of the Tarkessur shrine on the allegations (*a*) that he had been selected as the *chela* or disciple of the deceased *mohant*, (*b*) that the ceremony of initiation had been duly performed, by which he was brought into the brotherhood of his *guru*, and (*c*) that the installation ceremony had been performed with the consent of the *dasnami*, and that by virtue thereof he became the *mohant* and exercised the functions of that office, and on the death of the plaintiff an application to be substituted in his place was made on grounds which put the applicant into opposition to the original plaintiff and made his claim not dependent on the original plaintiff's case but in conflict with it: *Held* that the right of suit could not be said to survive to the applicant within the meaning of the sections of the Code relating to abatement of suit, but that the suit abated by the death of the plaintiff.

THIS was an application by one Keshub Chunder Giri to be substituted as a party to the suit in the place of the plaintiff deceased.

The suit was brought by Sham Chand Giri to establish his right to succeed as *mohant* of the *muth* or temple of Tarkessur and *shebait* of the idol Issur Taruck Nath Shiva.

The plaint in the suit stated that one Madhub Chunder Giri was, during his lifetime and up to the time of his death, *mohant* of the said temple, and *shebait* of the said idol, and as such was in possession of a considerable amount of moveable and immoveable property; that Madhub Chunder Giri, being desirous of nominating, according to the custom prevalent amongst *mohants*, a duly constituted disciple whom he might place on the *guddi* of the shrine in case he should be prevented by accident or misfortune from carrying on his duties, had, in 1279 B. S. (1872-1873), duly adopted the plaintiff as his *chela* or disciple, by whom, according to the custom amongst *mohants* upon a person being adopted as *chela* by his *guru* or spiritual guide, the ceremony of *bijai homa* or initiation into the brotherhood of *mohants* (without which no person could be adopted as a *chela*) was performed; that according to another custom, when a duly elected *chela* is intended to be installed as a successor to the *guddi*, the plaintiff as his principal *chela* was selected by Madhub Chunder Giri as successor in his place, and was, in 1880 B. S. (1873-1874), with due ceremony, installed and proclaimed *mohant*, and thereupon

* Application in Original Civil Suit No. 179 of 1893.

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[94] he was according to custom recognized by the Maharajah of Burdwan, within whose *zemindari* the shrine was situated, as having the right of the succeeding *mohant* and received a certificate of his initiation and installation having been performed and also a *sanad* or letter of recognition from the Maharajah of Burdwan; that thereafter Madhub Chunder Giri executed in favour of the plaintiff a deed of appointment whereby he appointed the plaintiff to act for him as *mohant* during his absence, and further appointed him permanently to the *guddi* of the shrine in case of his (Madhub Chunder's) death; that in 1874 Madhub Chunder Giri was convicted of adultery and sentenced to three years' rigorous imprisonment; that from the date of his installation as *mohant* up to 5th November 1878 the plaintiff occupied the *guddi* in the shrine as *mohant*, and was treated by the general public as *de facto mohant* and as suchwas in possession of the moveable and immoveable property belonging to the shrine, received the offerings made to the idol, realised the rents and profits of the immoveable property belonging to the shrine, and paid the dues in respect thereof; that in 1878 Madhub Chunder Giri resumed possession of the *guddi* as *mohant* and remained in such possession, until his death, and during the period between his resuming possession and his death the plaintiff was treated by him as his principal *chela* and was placed by him as *mohant* in charge of another shrine known as *gur* Bhowanipore, which he still held. Paragraph 15 of the plaint stated that "besides the plaintiff there is no duly constituted *chela* of the said Madhub Chunder Giri, nor any other person upon whom the said ceremony of *bijai homa* has been performed; nor did the said Madhub Chunder Giri at any time express any desire that any one other than the plaintiff should succeed to the said *guddi*, nor has the ceremony of installation been performed upon anybody except the plaintiff." The plaintiff went on to state that Madhub Chunder Giri died in Calcutta on 10th March 1893; that on the day prior to his death he sent for the plaintiff, who came to him and remained with him until his death, and duly performed his funeral ceremonies; and that in accordance with instructions received verbally from Madhub Chunder Giri to that effect before he died, the plaintiff proceeded to the shrine of Tarkessur and installed himself in the *guddi* in [95] the place of the deceased *mohant*, and remained in possession from 11th March up to 16th March 1893, when he was forcibly ejected by the defendant. The plaintiff prayed for a declaration that he was the duly constituted *mohant* of the shrine, and for possession thereof; for an injunction to restrain the defendant from interfering or dealing with the properties of the shrine; for a receiver; that an alleged will of Madhub Chunder Giri, under which the defendant claimed to have been appointed *mohant*, might be brought into Court, and the defendant required to prove it in solemn form; that the defendant might be declared ineligible for the office of *mohant* not being a *chela* or disciple; and for an account.

The petition of Keshub Chunder Giri in support of his application stated that a receiver had been appointed by consent on 20th March 1893, but before he could take possession, *viz.*, on the 21st March, the plaintiff died, and the receiver had consequently never been able to take possession, which it was important he should do as soon as possible, as otherwise much property, chiefly consisting of collections and offerings at the shrine, would be wasted; that according to the custom prevailing with regard to the succession to the office of *mohant* of the Tarkessur shrine the plaintiff Sham Chand Giri was entitled to succeed to the *guddi* of the shrine as *mohant* after the death of Madhub Chunder Giri, and after

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the death of the plaintiff the petitioner became entitled to succeed him and to be *mohant* of the shrine; that the petitioner was the *guru bhai* of the deceased plaintiff, and next in order of adoption and initiation to the deceased plaintiff as *chela* to Madhub Chunder Giri, and he was duly adopted and initiated by Madhub Chunder Giri and afterwards fully recognized by him as his *chela*, and as prior in order of adoption and initiation and senior to the defendant; that the petitioner was duly adopted as a *chela*, by Madhub Chunder Giri, and the ceremony of *bijai homa* was duly performed with reference to him by Madhub Counder Giri on 9th of Bysack 1878; that in the will of Madhub Ghunder Giri the petitioner was mentioned as the senior *chela* of Madhub Chunder Giri, and in the certificate granted to the plaintiff Sham Chunder Giri, as well as the deed of appointment of the [96] plaintiff mentioned in the plaint, the petitioner was described as the *chela* next in order to the plaintiff Sham Chunder Giri; that during the lifetime of Madhub Chunder Giri, and when the plaintiff performed the duties of *mohant*, the petitioner always assisted him with the concurrence of Madhub Chunder Giri; that after the *guddi* was resumed by Madhub Chunder Giri the petitioner was always placed in charge of the *guddi* during the absence of Madhub Chunder Giri, and when Madhub Chunder was at the temple he always assisted him in the discharge of the functions of a *mohant* and was practically in charge of the said shrine; that by the death of the plaintiff the petitioner had become the senior of the surviving *chelas* of Madhub Chunder Giri, and as such was entitled to succeed to the *guddi*.

The petitioner submitted that the right of suit survived to him, and that he was the legal representative of the plaintiff, and was entitled as such legal representative and successor to obtain the relief prayed for in the suit, and that the suit therefore had not abated by the death of the plaintiff.

The application was opposed by the defendant, who alleged that he was, on 1st February 1888, duly intiated and appointed a *chela* by the deceased *mohant*, Madhub Chunder Giri, by whom the ceremony of *bijai homa* had been duly performed with reference to the defendant. He claimed under a will, said to have been made by Madhub Chunder Giri on 5th March 1893 shortly before his death. Probate of this will had been refused by the District Judge of Hooghly, who found against the will, but an appeal from that decision to the High Court was pending. The defendant alleged that he performed the funeral ceremonies of the deceased *mohant* in succession to whom he had, in accordance with the will, duly installed himself as *mohant*; that Kesub Chunder Giri had separated himself from the shrine of Tarkessur and belonged to another hermitage; that he was not an heir to the plaintiff Sham Chunder Giri, as they belonged to different hermitages, and they had ceased to be *chelas* of the same *guru*, so that the relation of *guru bhai* did not exist between them; that there was no custom or usage by which a senior *chela* is entitled to succeed as *mohant*; that the ceremony of *bijai homa* had not been [97] performed by the late *mohant* with reference either to the plaintiff Sham Chand Giri, or Keshub Chunder Giri; and that he (the defendant), having been appointed *mohant* by Madhub Chunder Giri, who had power so to appoint him, and having duly installed himself as *mohant*, was entitled to be recognised, as *mohant* and his claim could not be disputed.

The application came on before the sitting Judge in Chambers.

Sir *Griffith Evans* (with Mr. *Woodroffe* and Mr. *Phillips*) in support of the application.

Mr. *Mitter* [with The Advocate General (Sir *Charles Paul*) and Mr. *W. C. Bonnerjee*] *contra.* 1894 APRIL 5.

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ORDER.

SALE, J.—After the elaborate arguments which have been addressed to me, I should have preferred stating the conclusion to which I have come and my reasons in a considered judgment, but the circumstances of the case show that it is important that delay should, if possible, be avoided.

The applicant is one Keshub Chunder Giri, who asks that his name may be entered in the record of this suit in the place of the deceased plaintiff, and that he may be allowed to amend the plaint as may be required by reason of the substitution of his name as plaintiff in place of the original plaintiff.

It is clear from the facts as stated by the applicant that, if the substitution be allowed, it would be necessary to alter very materially the case made in the plaint to enable the applicant, as the substituted plaintiff, to proceed with the suit.

The argument in support of the application is, first, that the right to sue has not abated by reason of the death of the plaintiff, and, next, that there has been a devolution of interest in favour of the applicant, which gives him the right to be made a plaintiff in place of the original plaintiff.

The first contention depends upon the meaning of the words "right to sue" in s. 361 of the Code of Civil Procedure. That section provides that "the death of a plaintiff or defendant shall not câuse the suit to abate if the right to sue survives." It does not predicate conversely that the death of a party shall cause **[98]** the suit to abate, if the right to sue does not survive, but that is clearly the practical effect of that section and of the subsequent sections, relating to abatement.

The law of abatement, as stated in the Procedure Code and elucidated in the illustrations to s. 361, is the same as it is in England. Indeed, the case given in illustration (*c*) is founded on the maxim "*actio personalis moritur cum persona.*" The illustrations to s. 361, as also the provisions of the next following sections show what the right to sue is, and in whom it vests.

Sections 362 and 363 relate to the case of the death of one of several plaintiffs. Section 365 applies to the case of the death of a sole plaintiff and has therefore a direct bearing on the present application. Section 372 relates to cases of transfer or devolution of interest not otherwise provided for. These sections prescribe the procedure to be followed by persons claiming to have the right to prosecute the suit under any of the circumstances therein mentioned. It is to be observed that under s. 365, on the death of a sole plaintiff, the *right to sue* vest in his legal representative.

The "*right to sue*" is based upon facts which go to make up what is called the "cause of action," and s. 371 provides that, "when a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action." The language of the latter section seems clearly to indicate that the cause of action of the original and revived suit must be the same, and that no fresh cause of action can be imported into a revived suit.

If I have correctly interpreted the meaning of s. 361, it becomes essential to examine the plaint in this suit and to compare some of its

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principal allegations with the facts as alleged by the applicant. For the present purpose it will be sufficient to refer to the following allegations upon which the original plaintiff relies as the basis of his claim: (1) that he was selected as the *chela* or disciple of Madhub Chunder Giri the deceased *mohant*; (2) that the ceremony of initiation had been duly performed by which he was brought into the brotherhood of his *guru*; and (3) that the [99] installation ceremony had been performed with the approval and consent of the *dasnami*, and by virtue thereof he became the *mohant* and exercised the functions of that office.

This suit was brought by the original plaintiff to have it declared that he was in fact the *mohant* of Tarkessur as the successor of Madhub Chunder Giri, and for consequential relief.

It would not serve the purpose of the present applicant to prove the allegations in the plaint showing that the original plaintiff succeeded Madhub Chunder Giri as *mohant*. The present applicant claims as a *chela*, not of the original plaintiff, but of his predecessor, and this claim in reality puts him in opposition to the original plaintiff, whose case, as stated in the 15th paragraph of the plaint, is to the effect that there was no *chela* besides himself as regards whom the ceremonies of initiation and installation were performed, or for whom the *sanad* of the Maharajah of Burdwan was obtained. The applicant therefore is in the position of a rival claimant who is desirous of setting up a claim of his own, which is not only *not* dependent upon the claim of the original plaintiff, but is in conflict therewith.

No doubt if this had been a suit to protect the property of the idol as against a trespasser, then it would be difficult to meet the arguments addressed to me on the part of the present applicant; but that is not the character of the suit, and the real object of the applicant is to establish a rival claim to the office of *mahant*, which can only be done by a separate suit. I take it that whoever is declared to be the *mohant*, the property which appertains to the shrine would follow that declaration. The suit is of a personal character inasmuch as its object is to establish a right to a personal office, and for that reason it appears to me that the right to sue does not survive. The result is that this suit abates. On the view I take of the first point it is not necessary that I should express any opinion on the second point, but it must be understood that in deciding, as I have done, I say nothing to prejudice the claim of the present applicant. All I say is that the claim cannot be set up in this suit.

The application is refused.

Mr. *Mitter* applies for costs as of a hearing.

[100] Sir *Griffth Evans* objects. This is a Chamber application. All that the Court can do is to certify for counsel.

Mr. *Mitter*.—The application has been adjourned into Court and it must be taken as a Court application. Even that will cover only a portion of our costs.

SALE, J.—There is no precedent for dealing with the costs of an application of this nature as costs of a hearing. The costs will be dealt with as the costs of an ordinary Court application.

Application refused.

Attorney for the applicant Keshub Chunder Giri: Mr. *U. L. Bose*.

Attorneys for the defendant: Messrs. *Sen & Co.*

J. V. W.

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Before Mr. Justice Sale.

KISSORY MOHUN ROY v. KALLY CHURN GHOSE.* [26th July, 1894.]

Practice—Mortgage—Suit on mortgage for an account and for sale of mortgaged property—Form of decree—Decree where puisne mortgagee is a party defendant and asks for an account on the footing of his mortgage—Application to vary decree.

In a suit on a mortgage, for an account, and for sale of the mortgaged property, where a puisne mortgagee who is made a defendant appears and proves his mortgage and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount found due to him out of the sale proceeds, the practice of the Court is, where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgage, to make a decree directing an account on the footing of each of the mortgages, and fixing one period of redemption for all the defendants. *Auhindro Bhoosun Chatterjee* v. *Chunnoo Lall Johurry* (1) referred to.

An application made by the purchaser of the equity of redemption, who had been made a defendant in such a suit, and had been served with a summons but had failed to appear, that the decree, which had been made in accordance with the above practice, should be varied by limiting it to a decree in favour of the plaintiff alone on the ground that the Court had no jurisdiction in such a suit to make a decree between co-defendants, was dismissed.

[R., 26 A. 407=A. W. N. (1904) 74; 14 C.P.L.R. 177 (180); D., 1 C.L.J. 31 (37); 10 C.L.J. 150=1 Ind. Cas. 264; 37 C. 907=8 Ind. Cas. 1142.]

THIS was the hearing of a rule to show cause why a decree which had been made in a mortgage suit should not be varied.

[101] The suit was brought by Kissory Mohun Roy, and the defendants were Kally Churn Ghose, Panch Cowrie Ghose, Pran Gobind Shaha, and Tin Cowrie Ghose.

The plaint stated that a mortgage was executed in favour of the plaintiff on the 4th Bhadur 1205 (19th August 1888) by the first defendant Kally Churn Ghose of certain house property in Calcutta, to secure repayment of the sum of Rs. 14,856, being principal and interest due from that defendant on a *hathchitta* account, and that subsequently to the execution of that mortgage, *viz.*, on the 30th Aughran 1295 (14th December 1888), another mortgage of the same and other properties was executed by the first and second defendants, Kally Churn Ghose and Panch Cowrie Ghose, in favour of the plaintiff, to secure repayment of Rs. 30,918 principal and interest, also due by those defendants on a *hathchitta* account; and the plaintiff prayed for an account of what was due on each of the mortgages, and, if necessary, for a sale of the properties.

The third defendant, Pran Gobind Shaha, was a subsequent mortgagee of (amongst others) the properties mortgaged to the plaintiff on the 19th August and 14th December 1888, respectively. The fourth defendant, Tin Cowrie Ghose, had, on 6th January 1892, purchased the properties subject to the mortgage of the plaintiff and the third defendant.

The third defendant, Pran Gobind Shaha, alone appeared in the suit and put in a written statement, in which he stated that the properties mortgaged to the plaintiff had (with others) been mortgaged to him by the first defendant on 28th September 1891, and he asked that, subject to

* Application in Original Civil Suit No. 595 of 1893.

(1) 5 C. 101.

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the plaintiff's claim, the mortgaged properties might be declared liable to satisfy his mortgage debt. The decree was for an account of what was due to the plaintiff on the mortgage of 19th August 1888; for an account of what was due to the plaintiff on the mortgage of 14th December 1888; for an account of what was due to the third defendant, Pran Gobind Shaha, on the mortgage dated 28th September 1891; for payment by the defendant Tin Cowrie Ghose of the sums so found due on the mortgages within six months and release of the mortgaged properties on such payment; and in default of [102] payment it was directed that the mortgaged properties should be sold and the proceeds paid into Court to satisfy the mortgage debts, and if the proceeds were not sufficient to satisfy the debts that the balance should be paid by the respective mortgagors.

On the application of the fourth defendant, Tin Cowrie Ghose, the purchaser of the equity of redemption in the mortgaged properties, a rule was granted calling on the plaintiff and the defendant Pran Gobind Shaha to show cause why the decree should not be varied so as to limit it to a decree in favour of the plaintiff.

Mr. *O'Kinealy*, for the defendant Tin Cowrie Ghose, in support of the rule.

Mr. *T. A. Apcar*, for the plaintiff Kissory Mohun Roy.

Mr. *Phillips*, for the defendant Pran Gobind Shaha.

The following cases were cited: *Kevan* v. *Crawford* (1), *Smithett* v. *Hesketh* (2), *Doble* v. *Manley* (3), *Bartlett* v. *Rees* (4) and *Platt* v. *Mendel* (5).

ORDER.

SALE, J.—The plaintiff in the present case is the first mortgagee of certain properties and the second mortgagee of the same and other properties. The third defendant is mortgagee of the properties comprised in the second mortgage. The first defendant is the original mortgagor. The fourth defendant is the purchaser of the equity of redemption. The suit is for an account on the footing of the plaintiff's mortgage and for sale of the properties. At the hearing the third defendant appeared and proved his mortgage and asked that the payment of his claim should be provided for. The original mortgagor also appeared. The other defendant, the purchaser of the equity of redemption, did not appear. As between the parties appearing no question was raised as to the mortgages, and a decree was made for an account of what was due on each of the mortgages. Six months' time was allowed for payment of what should be found due on the several mortgages, and it was directed that in default of payment the properties comprised [103] in the several mortgages should be sold, and the sale proceeds marshalled and applied in payment of the several mortgage debts. The decree further directed the payment by the original mortgagor of any balance remaining due after the sale proceeds had been exhausted. The purchaser of the equity of redemption has now obtained a rule calling on the other parties to show cause why the decree should not be varied and restricted so as to affect the plaintiff's mortgage only; and it was said on the part of the applicant that in making a decree in the present form the Court had in effect made a decree as between co-defendants which in a suit of this kind it has no jurisdiction to do. A number of English authorities were cited; but it seems to me that they do not

(1) L. R. 6 Ch. D. 29. (2) L. R. 44 Ch. D. 161. (3) L. R. 28 Ch. D. 664.
(4) L. R. 12 Eq. 395. (5) L. R. 27 Ch. D. 246.

support the contention which is now put forward. The cases are all foreclosure actions, in which the point considered and determined was whether as between the plaintiff, the first mortgagee, and the defendants who were pusine incumbrancers and the mortgagor there should be only one period of redemption fixed for all the defendants, or whether there should be successive periods of redemption so as to give each incumbrancer the opportunity in turn of redeeming the plaintiff and foreclosing all subsequent incumbrances.

The rule to be deduced from these authorities I think is that where the puisne incumbrancers do not appear, or where, if they do appear, any question as to priority arises, there will only be one period of redemption allowed without prejudice to questions arising as between the defendants, but that, on the other hand, where a puisne incumbrancer does appear and sets up and proves his mortgage, and no question as to priority arises, the Court will allow him to have the benefit of the action and make a decree in his favour, assigning him a separate period of redemption.

The right of puisne incumbrancers to appear and ask for judgment as between themselves and other defendants, under the circumstances specified, seems to be clearly recognised and laid down by Chitty, J., in the case of *Platt* v. *Mendel* (1).

That is the practice which has been adopted in foreclosure actions as to subsequent incumbrancers who appear and prove **[104]** their mortgages. In this Court, where suits on mortgages are usually not for foreclosure but for sale of the property, the analogous position is that of a puisne mortgagee who is made a defendant, and who appears and proves his mortgage, and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount due to him out of the sale proceeds. In hese cases it has been the practice of this Court for a long series of years—certainly since the decision of Pontifex, J., in 1879 in the case of *Auhindro Bhoosun Chatterjee* v. *Chunnoo Lall Johurry* and others (2) that where no issue is raised as between the defendants, and no question of priority arises, on proof of the subsequent mortgages, to make a decree directing an account on the footing of each of the mortgages and fixing one period of redemption for all the defendants. The decree in the present case was made strictly in accordance with that practice, which is now too well settled to be disturbed. I think, therefore, the decree ought not to be set aside or varied on the ground that it was made without jurisdiction.

The next point is whether the applicant has made a sufficient case to have the decree set aside under s. 108 of the Code.

He admits he was duly served with the summons in the suit, but he says he was prevented by sufficient cause from appearing when the suit was called on for hearing within the meaning of the section, inasmuch as he had no notice, either in the summons to appear and answer or otherwise, that a decree as between the co-defendants would be asked for or made, and that he was advised that he need not appear in the suit.

He wishes now to intervene and raise an issue as to the consideration alleged for the second mortgage, which he says he would have raised at the hearing had he known that this could have been done.

Having regard to the practice followed by this Court for the past seventeen years, I do not think the applicant can be heard to say that he was unaware that it was open to the Court to make a decree on the footing of

(1) L.R. 27 Ch. D. 248 (249). (2) 5 C. 101.

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the second mortgage, if asked to do so by the second mortgagee, and if no issue were raised as to its validity. It is [105] moreover admitted that the applicant was in actual attendance at the Court on the day of hearing under a subpœna issued in this case. He says, however, that he went away having been informed that his presence was not required. I must hold that his non-appearance at the hearing was voluntary, and that in no sense was he prevented from appearing. The result is that the rule must be discharged with costs.

Mr. *Apcar* applies on behalf of the plaintiff for his costs of the application.

SALE, J.—You may add your costs to your claim.

Rule discharged.

Attorney for the applicant, the defendant, Tin Cowrie Ghose: Mr. *N. C. Bose.*

Attorney for the plaintiff: Mr. *Rutter.*

Attorney for the defendant, Pran Gobind Shaha: Babu *Norendro Nath Sen.*

J. V. W.

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22 C. 105.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

UMBICA CHURN SEN AND OTHERS *v.* BENGAL SPINNING AND WEAVING COMPANY, LIMITED.* [26th July, 1894.]

Inspection of documents—Affidavit of documents, Sufficiency of—Practice—Right to put in further affidavit in support of claim of privilege where original affidavit is not sufficient—Documents referred to in pleadings as stating facts on which party setting them up relies.

Where an affidavit of documents stated, with regard to certain documents of which the plaintiffs asked for inspection, that the defendants objected to produce them for inspection " because such documents were obtained after dispute arose, and for purposes of litigation that might arise between them and the plaintiffs," *Held*, in an application for their production and inspection, that the affidavit was not sufficient to support the defendants' claim to privilege.

Held also, in such an application the party claiming privilege is entitled to put in and use a further affidavit in support of the claim of privilege, and is not confined to the grounds made in the affidavit in which the claim is first set up. *M'Corquodale* v. *Bell* (1) referred to. Where, however, the party comes into Court relying on the original affidavit as [106] sufficient to support his claim of privilege, but asks the Court, if it should think otherwise, for leave to put in a further affidavit in support of his claims, *quœre*, whether he should be allowed to do so.

In a suit brought in January 1884 to recover money for work done and materials supplied in the erection of certain mills for the defendants, in which the defence was that the quality of the work was inferior to that contracted for, and the defendants stated in their written statement that, "in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs, they caused the same to be inspected by two independent engineers, in the month of July 1893, and they at once discovered such extensive defects therein that the costs of making good such defects will far exceed any possible sum due to the plaintiffs:" *Held* that the defendents could not set up a claim of privilege for the reports of the two engineers. *Anderson* v. *Bank of British Columbia* (2) referred to.

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* Original Civil Suit No. 48 of 1894.

(1) L.R. 1 C.P.D. 471. (2) L.R. 2 Ch. D. 644.

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Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit, and then sets up those facts by way of answer to the plaintiffs' claim, he cannot afterwards attempt to make the case that the documents are confidential and intended merely for his legal advisers, or for the purpose only of evidence in the case.

THIS was an application by the plaintiffs for inspection by them of certain documents in the possession of the defendant-company.

The suit was instituted on 19th of January 1894 for the recovery of Rs. 61,467 for work done and materials supplied by the plaintiffs for the defendant company under a contract between them in connection with the erection of the defendant company's mills at Mahesh near Serampore, for Rs. 24,456, being the value of certain plant, materials, implements, &c., belonging to the plaintiffs, but detained by the defendant-company, and for Rs. 20,000 for damages for breach of contract by the defendant company. The written statement of the defendant-company, filed on 17th April 1894, alleged that there was delay on the part of the plaintiffs in carrying out the work, and that the materials supplied and work done was inferior to the quality contracted for, and that on 21st of July 1893 they took the said work out of the hands of the plaintiffs, and on 13th September gave notice to the plaintiffs that they would measure the work done by them, and as the result of the measurements thereafter made they contended that the sum of Rs. 29,764, which admittedly would have been payable **[107]** to the plaintiffs, was not payable by reason of the inferiority of the work done and materials supplied. In the 13th paragraph of their written statement the defendant-company stated that "in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs they caused the same to be inspected by two independent engineers in the month of July 1893, and they at once discovered such extensive defects therein that the costs of making good such defects will, as they are informed and believe, far exceed any possible sum due to the plaintiffs. Among other things they discovered that the concrete, which was an essential part of the foundation, the mill being built on a sandy chur soil, had been omitted, and in place thereof rammed brick of inferior quality had been substituted without a trace of lime in it; in some cases a top dressing of mortar having only been given—a defect which would necessitate the underpinning of the walls throughout; that the earth of the floors had been so badly rammed that the stone flooring had subsided everywhere, and the whole of the floors would have to be taken up and reset; that the wood work of the loom-shed would have to be taken down and fresh trusses substituted; that the iron beams were of inferior foreign quality, and it was doubtful if they would stand the strain provided for those in the plans; and various other defects necessitating in some cases a very large expenditure to put matters right and in other cases involving considerable extra and useless expense to the defendant-company were also discovered."

On the 20th February 1894 the plaintiffs obtained the usual order for the defendant-company to file an affidavit of documents relating to the suit, and on the 13th April an affidavit was filed by Vasantrao Morojee Kirtikar, the Secretary of the defendant-company, in which he stated "that the defendant-company have in their possession or power the documents relating to the matters in question in this suit set forth in the first, second, and third parts of the schedule hereto annexed and marked A; that the defendant-company object to produce for inspection the documents set forth in the second part of the said schedule, because the same are

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cause papers prepared by their attorneys and containing instructions given by them to enable their attorneys to act for [108] them in this suit, and that the defendant-company also object to produce for inspection the documents set forth in the third part of the said schedule, because such documents were obtained after dispute arose and for the purposes of litigation that might arise between them and the plaintiffs."

The schedule annexed to this affidavit, so far as the documents which the defendant-company object to produce are concerned, was as follows: "Part II. The cause papers in this suit. Part III. Report made by W. Arundell, Esq., dated 15th July 1893. Report made by J. Hammet, Esq., dated 27th July 1893."

It was of these two reports that the plaintiffs desired and claimed inspection which was refused by the defendant-company.

In the affidavit of Hurish Chunder Day, one of the plaintiffs, filed in support of the application for inspection, it was stated that though the summons was served on, and appearance entered on behalf of the defendant-company on the 24th and 26th January 1894, respectively, the written statement of the defendant-company was not filed until 17th April 1894; that the two reports mentioned in Part III of the schedule to the affidavit of documents filed on behalf of the defendant-company, inspection of which the defendant-company claimed to withhold, were the reports of the two engineers mentioned in para. 13 of the defendant-company's written statement; that the suggestion in the defendant-company's affidavit that the said reports were obtained for the express purpose of this litigation was misleading, and that in fact the said reports were obtained merely for the purpose of enabling the defendants to ascertain the nature of the work done by the plaintiffs in the terms of the contract and they could only have been so obtained indirectly for the purpose of litigation; and in support of this allegation a letter from the secretary of the defendant-company to the plaintiffs, dated 1st July 1893, was set out in which they said: "In acknowledging receipt of your letters 501, 502 and 503 of the current month I have to repeat that I entertain great doubts about your work generally. I consider it to be only second class instead of first class work contracted for, and with a view to remove this doubt I have requested Mr. W. Arundell, M.S.A., the Consulting Architect of 8, Russell Street, Calcutta, to survey the company's buildings at [109] Serampore and report on same. As soon as this survey is over and the report submitted I shall be in a position to judge whether or not your work, so far done for the company, is in accordance with your agreements with this company."

The plaintiffs submitted that these documents were not privileged.

Mr. *O'Kinealy* appeared for the plaintiffs in support of the application.

Mr. *Graham*, for the defendant-company.

ORDER.

SALE, J.—In this case the plaintiffs obtained the usual order on summons in Chambers calling on the defendant-company to show cause, why they should not produce for inspection of the plaintiffs the documents set forth in Part III of the schedule of the affidavit of documents of the defendant-company, and why the documents should not be deposited with the Registrar of this Court, with liberty to the plaintiffs and their attorneys to inspect the same and to take copies thereof, and why the costs of the application should not be paid by the defendant-company.

In the affidavit of documents of the defendant-company the documents, of which production and inspection are sought, are thus referred to: "The defendant-company also object to produce for inspection the documents set forth in the third part of the said schedule, because such documents were obtained after dispute arose and for the purposes of litigation that might arise between them and the plaintiffs." Turning to Part III of the schedule the documents are described as the "Report made by W. Arundell, Esq., dated the 15th July 1893, and the report made by J. Hammet, Esq., dated the 27th July 1893."

The suit itself was instituted on 19th January 1894 by the plaintiffs to recover a large sum of money for work done and materials supplied for the defendant-company in the erection of certain mills for the defendant-company at Mahesh near Serampore. On the hearing of the application the case of the defendant-company was put in two ways—1*st*, it was said that the affidavit of documents sufficiently raised the claim of privilege, and that under that claim the documents were protected, and next, the defendant-company sought, if the view taken by the Court should **[110]** be against them, to put in a further affidavit of documents for the purpose of supporting their claim to privilege.

On the part of the plaintiffs it is contended in the first place that the claim of privilege as set up in the affidavit of documents is insufficient, and further that the defendant company are confined to the grounds set up in that affidavit, and that they were not at liberty to put in any further affidavit setting forth further grounds in answer to the plaintiffs' application.

There can be no question that the affidavit as it stands does not protect these documents from production and inspection as sought by the plaintiffs. The terms used are vague, and it is not stated that the reports were confidential in the sense that they were prepared at the instance of the legal advisers of the defendant-company, or for the purpose of being submitted to them for their advice, and no authority was cited to show that the claim of privilege was ever so extended as to cover grounds such as those alleged in this affidavit. But I think the rule is that in an application of this kind for production and inspection of documents the party is entitled to put in and use a further affidavit in support of the claim of privilege, and that he is not confined to the grounds made in the affidavit in which the claim is first set up. The case of *M'Corquodale* v. *Bell* (1) is a sufficient authority for this proposition. That case goes further than is required for the point now raised, inasmuch as it shows that a party can set up grounds not taken in his first affidavit of documents for the purpose of supporting his claim of privilege.

The case, however, is different when the party comes in relying on the original affidavit as sufficient to support the claim of privilege, but asks the Court, if it should think otherwise, for leave to put in a further affidavit in support of his claim. It is at the least doubtful whether a party should be allowed to take up a position which would give him an undue advantage. It is obvious that in putting his case in that alternative form he has the opportunity of hearing the objection taken to his original grounds and of mending his own case accordingly. But however that may be, it is, I think, beyond doubt that I ought not to give the leave **[111]** sought by the defendant-company in this case, because, in my opinion, having regard to the statements contained in para. 13 of the

(1) L.R. 1 C.P.D. 471.

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written statement, it is no longer open to the company to claim privilege for these documents.

Paragraph 13, it is admitted, refers to these documents in these terms: "The defendant-company, in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs, caused the same to be inspected by two independent engineers in the month of July 1893, and they at once discovered such extensive defects therein that the costs of making good such defects will, as they are informed and believe, far exceed any possible sum due to the plaintiffs."

The written statement then proceeds to set forth the various facts obtained from the reports of the two engineers as facts upon which the company rely as an answer to the plaintiffs' claim. Now, it seems to me that when a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit, and then sets up those facts by way of answer to the plaintiffs' claim, it is too late for him to turn round and attempt to make the case that the documents are confidential and intended merely for their legal advisers or for the purpose only of evidence in the case.

The reports are in fact statements of relevant facts made by the agents of the defendant-company admittedly for the information of the defendant-company, and are the best evidence of the knowledge of the defendant-company of those facts. I therefore think that the documents themselves are not privileged, and moreover that they clearly fall within that class of documents which are governed by the ruling in *Anderson* v. *Bank of British Columbia* (1).

An order will be made in terms of the summons, with costs as against the defendant-company. I will certify for counsel.

Application granted.

Attorneys for the plaintiffs: Messrs. *Morgan & Co.*
Attorneys for the defendant-company: Messrs. *Sen & Co.*

J. V. W.

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22 C. 112.

[112] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

PERTAP UDAI NATH SAHI DEO AND ANOTHER (*Plaintiffs*) v. MASI DAS (*Defendant*).* [24th July, 1894.]

Chota Nagpore Tenures Act (Bengal Act II of 1869)—Register prepared by a Special Commissioner appointed under the Act, Effect to be given to, as evidence—Conclusive nature of such Register.

A register of tenures prepared by a Special Commissioner appointed under Bengal Act II of 1869 (the Chota Nagpore Tenures Act) after it has been confirmed by the Commissioner of the Division, and such confirmation has been duly published in the *Calcutta Gazette*, is conclusive evidence of all matters recorded therein, and it is not open to a Civil Court to hold that, because a Special Commissioner did not rightly understand a decision of the Commissioner, and because the register was not prepared in accordance with such order, it is otherwise than conclusive; nor is a Court competent even to discuss the

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* Appeal from Original Decree No. 67 of 1893, against the decree of Babu Amrito Lal Pal, Subordinate Judge of Lohardugga, dated the 12th of November 1892.

(1) L. R. 2 Ch. D. 644.

question whether a Special Commissioner, in preparing such register, rightly appreciated the Commissioner's decision when his own order has been given effect to by the register prepared, and has been confirmed by the Commissioner under s. 25 of the Act.

1894 JULY 24.

APPELLATE CIVIL.

22 C. 112.

THE Maharajah of Chota Nagpore and his *ticcadar*, who were the plaintiffs in this case, sued, the one as proprietor and the other as *ticcadar* of the village of Arangi, to recover possession of 13¾ annas of *done* or rice lands, which the defendant was alleged to have taken wrongful possession of during the Maharajah's minority, and which were claimed by the latter as his *majhahas* lands. The defendant admitted being in possession of the lands, but claimed to hold them as part of his *bhuinhari* lands.

Between the years 1877 and 1880 a Special Commissioner appointed under the Chota Nagpore Tenures Act (Bengal Act II of 1869) had made an investigation into the tenures existing in Arangi, in the course of which several proceedings were held and orders passed by him, and he had prepared, in accordance therewith, a register of all *majhahas* and *bhuinhari* lands. Against one of these orders an appeal was preferred by the defendant to the [113] Commissioner of the Division, who modified the order of the Special Commissioner on the 5th May 1879. But a dispute having occurred as to the effect of the Commissioner's order, the matter came once more before the Special Commissioner on the 5th December 1879 when he passed his final order, embodying therein the construction which he put upon the Commissioner's order, and decreeing possession of the disputed lands to the minor Maharajah.

The register was prepared in accordance with the final order, and was confirmed by the same Commissioner on the 13th August 1880, and such confirmation was duly published in the *Calcutta Gazette* in accordance with the requirements of s. 25 of Bengal Act II of 1869. The Subordinate Judge held that it was open to the defendant to show that the register, not being in conformity with the Commissioner's order of the 5th May 1879, had not been prepared in pursuance of s. 25, and, moreover, that the suit was barred by limitation, and he dismissed the plaintiffs' suit. From that decree the plaintiffs preferred the present appeal.

Mr. *W. R. Donogh* and Babu *Karuna Sindhu Mookerjee*, for the appellants.

Babu *Kali Charan Banerjee*, for the respondent.

Mr. *Donogh*.—The *majhahas* register prepared on the 13th August 1880 is conclusive evidence that the Maharajah was in possession of the lands in dispute on that date (see s. 26, Bengal Act II of 1869). It is an admitted fact that the defendant is now in possession. It follows therefore that he must have dispossessed the Maharajah at some time subsequent to the date of the register. Whatever the time was, it would be within twelve years of the date of institution of the suit. Consequently the suit is within time. The fact that the *majhahas* register contains these lands is conclusive that they are *majhahas* lands, and the absence of any mention of them in the *bhuinhari* register is equally conclusive that they are not *bhuinhari* lands. See *Kirpal Narain Tewari* v. *Sukurmoni* (1). Under Bengal [114] Act II of 1869 the Special Commissioner is empowered to investigate and ascertain the titles and tenures of lands alleged to be *majhahas* or *bhuinhari* and to demarcate

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the same under s. 3; and further to record who is the occupant of the land, and to satisfy himself that the occupation has existed for at least twenty years before the passing of the Act; ss. 5, 6, and 8. The registers are therefore also conclusive as to the possession of the occupant whose name is recorded. These registers show that at the time when the Special Commissioner prepared them the records of the various proceedings, and also the decisions and orders passed in them, were all before him, so that it must be presumed that he revised and corrected them in accordance with those decisions and orders, as directed by s. 25. The registers are certainly in accordance with his own final decision of the 5th December 1879 passed after his local investigation, and in which he construed the decision of the Commissioner dated the 5th May 1879. His construction may or may not be correct, but it was confirmed by the very Commissioner whose decision was so construed. The fact that he confirmed it is the strongest proof of its correctness. In any case the registers are in accordance with the Special Commissioner's view of all the orders which were passed. His decision is moreover final, as no appeal was made from it. The correctness of his view, or of the register prepared in accordance with that view, should not now be called in question after it has been confirmed by the Commissioner and the confirmation duly published in the *Calcutta Gazette*.

Babu *Kali Charan Banerjee*.—Every order or decision passed by a Commissioner under this Act is final, unless varied or altered on review, ss. 15 and 20. The Commissioner's order of the 5th May 1879 is therefore a final order, inasmuch as it has not been so varied or altered. It is clear that the register is not in conformity with that order, so the register could not have been revised and corrected in accordance with it as required by s. 25. That being so, it cannot be said to be a register prepared according to the provisions of s. 25. It is therefore not a valid register, nor binding on the defendant. No doubt it has been confirmed by the Commissioner, but mere confirmation is not **[115]** enough, and it is always open to the parties to show that a register is at variance with any decisions or orders passed. An incorrect register cannot be said to be conclusive evidence of the matters which it contains. In this case, therefore, the register is not evidence that the lands in dispute are *majhahas*. Nor is it conclusive that the Maharajah was ever in possession. It nowhere indicates that possession was given to him, nor does s. 5 at all contemplate a finding by the Special Commissioner as to possession. There was no proceeding held under s. 6. On the contrary there is evidence to show that Masi Das has all along been in possession, and the rent receipts filed by him show that he paid rent for the lands to the Court of Wards. The suit is barred by limitation, as it is clear that Masi Das has been in possession for more than twelve years.

Mr. *Donogh* was heard in reply, and referred to the Statement of Objects and Reasons for the Act.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

The plaintiff in this case, Maharajah Sri Pertap Udai Nath Sahi Deo, is the proprietor of *mouza* Arangi in the district of Chota Nagpore, and, as such proprietor, is entitled to hold certain lands as *majhahas* which, as the preamble to Bengal Act II of 1869 states, are lands reserved for the use of the proprietors of the villages and at their absolute

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disposal. The defendant Masi Das holds certain lands in the same village Arangi as *bhuinhari*, which are lands held by persons claiming to be descendants of the original founder of the village. The plaintiff's father Maharajah Juggernath Sahi Deo died in July 1869, and upon this event taking place, the zemindari of the plaintiff was taken charge of by the Court of Wards. When the estate was in the hands of the Court of Wards, a dispute arose before the Special Commissioner appointed under Bengal Act II of 1869 between the parties with regard to the lands which they were respectively entitled to hold as *majhahas* and *bhuinhari;* and it would appear that upon that occasion Masi Das claimed 12 *powas* of land. The Court of Wards, on the other hand, alleged that Masi Das was only entitled to 4½ *powas* of land at a *jama* of Rs. 32. The Special Commissioner, in his **[116]** decision of the 23rd July 1879 in the cases entitled "Dispute case No. 84 of 1877-78," held that the *bhuinhar* was only entitled to 4½ *powas*of land at an annual rent of Rs. 32, and he accordingly decreed to Masi Dass 4½ *powas* only. There was another proceeding before the Special Commissioner in case "No. 103 of 1877-78," in which the Court of Wards claimed to hold 9½l*powas* of lands as *majhahas*. In that proceeding Masi Das was one of the defendants; and the Special Commissioner in his judgment said that the case was governed by his decision in case No. 84; and he accordingly gave the plaintiffs a decree for the lands claimed.

An appeal (No. 106 of 1879) was preferred to the Commissioner by Masi Das from the decision of the Special Commissioner, and the Commissioner held that the whole of the lands, namely 12 *powas*, claimed by him (Masi Das) was *bhuinhari*; and he reversed the decision of the Special Commissioner and decreed to Masi Das the lands claimed, and he also declared that the rent payable by Masi Das was at the rate of Rs. 8 per *powa*. Subsequently there was another proceeding before the Special Commissioner on the 5th of December 1879. This proceeding was held preparatory to the register, which, under s. 5 of the Act, the Special Commissioner had to prepare. It appears that upon that occasion an objection was preferred by the Court of Wards representing the estate of the plaintiff, that Masi Das had demarcated, along with his *bhuinhari* lands, a large area of *majhahas* lands to which he was not entitled. And the Special Commissioner, in determining the question raised before him, inspected the land and proceeded to consider and interpret the decision of the Commissioner of the 5th May 1879; and he held that Masi Das was entitled to only 8¾ *powas* of land upon payment of rent at the rate of As. 8 per *powa*; and he accordingly declared that the rest of the lands in contest between the parties were *majhahas* lands. He then directed that the 8¾ *powas* of land described in his judgment should be registered as the *bhuinhari* of Masi Das. The register was prepared in accordance with this direction. The register was in due course placed before the Commissioner for confirmation under s. 25 of the Act; and that officer confirmed it on the 13th of August 1880.

[117] The register being thus confirmed by the Commissioner was published in the *Calcutta Gazette* on the 1st September 1880, in accordance with the directions of s. 25 of the Act.

Masi Das, notwithstanding this register recording the quantity of *bhuinhari* land as only 8¾ *powas*, paid to the Court of Wards, and they received from him, rent for the whole of the 12 *powas* of land at the rate of As. 8 per *powa* from 1880 to the year 1884-85.

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The plaintiff attained majority on the 21st of March 1887; and he commenced the present action on the 19th of January 1891 for recovery of possession of $13\frac{3}{4}$ annas, equivalent to, as we understand, 3 *powas* of land described in the plaint as *majhahas* land which, he alleged, had been wrongfully taken possession of by the defendant Masi Das on or after the 13th of August 1880, that being the date, as already mentioned, when the register prepared by the Special Commissioner was confirmed by the Commissioner. This land is admittedly part of the land which was claimed by Masi Das in the proceeding before the Special Commissioner in 1879; but which, according to the register prepared by the Special Commissioner, was recorded as *majhahas* land. The defendant pleaded that the land in suit was part of his *bhunhari* land, and he relied upon the decision of the Commissioner of the 5th May 1879 as a final decision between the parties. He further pleaded that the suit was barred by the law of limitation. The Subordinate Judge of Lohardugga has accepted the contention of the defendant, and held that the decision of the Commissioner of the 5th May 1879 was final, and the subsequent decision by the Special Commissioner of the 5th December 1879 was invalid and illegal, and that the register prepared by the Special Commissioner, although it was confirmed by the Commissioner, was not a register prepared according to law, and that, therefore, it could not be regarded as conclusive evidence between the parties. He has further held that the suit of the plaintiff is barred by limitation, the possession of the plaintiff before 1880 (when he alleges his cause of action arose) being not satisfactorily proved.

The present appeal is by the plaintiff, and it is contended on his behalf that the Court below has misread the provisions of Act II of 1869, and has not given to the register prepared by the Special Commissioner and confirmed by the Commissioner that effect which, [118] under the law, it bears; and further that the suit is not barred by limitation.

In view of the arguments addressed to us on either side in this appeal, it will be necessary, in the first instance, to refer very shortly to some of the provisions of Bengal Act II of 1869, so far as they bear upon the questions arising in this case.

The preamble of the Act, after stating what are *bhuinhari* lands and what are *majhahas* lands, states "that it is desirable that these tenures should be defined and recorded, and a register made of all rights, privileges, and liabilities affecting the holders thereof."

Section 2 gives the Lieutenant-Governor of Bengal authority to appoint certain persons as Special Commissioners and Commissioners for the purpose of the Act.

Section 3 declares what the duties of the Special Commissioners should be; and it states that they are to investigate and ascertain the titles and tenures of all lands within their jurisdiction which may be alleged by any person to be held upon *bhuinhari* and *majhahas* tenures, respectively, and to demarcate the same.

Section 4 provides that, in making such investigation, the Special Commissioner, in addition to the powers conferred on him by the Act, shall exercise all the powers conferred upon a Collector making a settlement of land revenue under Reg. VII of 1822.

Section 5 states that the Special Commissioner shall make an accurate register of the lands which he may ascertain to belong to the *bhuinhari* and *majhahas* classes, respectively.

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Section 14 provides for an appeal being preferred from any order or decision by the Special Commissioner to the Commissioner of the Division.

Section 15 gives to a person aggrieved by any order or decision of the Special Commissioner or Commissioner liberty to apply for a review of judgment.

Section 20 states that "no decision or order of the Special Commissioner shall be in any way altered, varied or reversed save on review by the Special Commissioner under ss. 15, 16, 17, 18 and 19 of this Act, or by appeal to the Commissioner of the [119] Division under s. 24 of this Act;" and that "no suit shall be received in any Court to vary or set aside any such order or decision of the Special Commissioner, or any decision or order upon appeal or upon review by the Commissioner of the Division made under the provisions of this Act, and every such decision or order upon appeal by the Commissioner of the Division shall be final, unless it be altered, varied, or reversed by the said Commissioner on review under ss. 15, 16, 17, 18 and 19 of the Act."

Section 25 provides that "the register of each village prepared under the provisions of s. 5 of this Act shall, when finally revised and corrected in accordance with any decisions and orders of the Special Commissioners and the Commissioner of the Division under this Act, be confirmed by the Commissioner of the Division, and such confirmation shall be published forthwith in the *Calcutta Gazette*."

Section 26 states that "every register to be prepared under this Act, after publication of the confirmation thereof in pursuance of the section next preceding, shall be conclusive evidence of all matters recorded in such register in pursuance of this Act," and that "from and after such publication of the confirmation of the register relating to any village, no evidence shall be received that any lands in such village not mentioned in such register are of *bhuinhari* or of *majhahas* tenure."

It will be observed that under s. 20, the decision of the Commissioner of the Division on appeal is final; and so we may take it that the decision of the Commissioner, dated the 5th May 1879, was final between the parties; but at the same time the subsequent decision of the Special Commissioner of the 5th December 1879, was likewise final, no appeal having been preferred against it to the Commissioner, and it having not been altered or varied on review. The Special Commissioner was then called upon to determine the question whether Masi Das had not demarcated as *bhuinhari* more lands than he was entitled to; and he did so after an inspection of the locality, and according to the construction that he put upon the decision of the 5th of May 1879. He had also to revise and correct under s. [120] 25 the register in accordance with the decisions that had already been passed; and he did so in accordance with his own understanding of the decision of the Commissioner.

It was argued before us by the learned vakil for the respondent that the revision and correction of the register by the Special Commissioner were not in accordance with the decision of the Commissioner; and we think, as we understand that decision, that he is right in his contention, and that the Special Commissioner did not rightly appreciate the judgment and the finding of the Commissioner. But then such revision and correction were in accordance with the interpretation that the Special Commissioner put upon the decision of the Commissioner. The register being thus revised and prepared was laid before the Commissioner for confirmation; and

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we find, on a reference to the column of remarks therein, that the case No. 84 of 1877-78 and the appeal case No. 106 of 1879 were distinctly noted, as also a miscellaneous case No. 540 of 1879-80 which, we presume, was the identical case that was dealt with by the Special Commissioner on the 5th December 1879. We may, therefore, presume that the whole matter was placed before the Commissioner, and that he exercised his own judgment in the said matter. And when he gave his sanction to the register, he must have been satisfied that the Special Commissioner had rightly understood his judgment of the 5th May 1879.

It was, however, contended by the learned vakil for the respondent that the register, not having been revised and corrected in accordance with the final decision of the Commissioner of the 5th May 1879, was not a register prepared according to law, and that therefore the confirmation of such a register by the Commissioner has no efficacy whatsoever. But we are unable to agree with this contention because, as already stated, the Special Commissioner, in the course of his duty in the investigation of the questions that were raised before him, having been called upon to interpret the decision of the Commissioner, put his own construction upon it and made an order which, unless it were reviewed or appealed against, would be final according to law. It was an order subsequent to that passed by the Commissioner, and the register having been prepared in accordance with such order, and [121] such register having been confirmed by the same appellate authority, the Commissioner of the Division, under s. 25 of the Act, and this register having been duly published in the *Calcutta Gazette* as directed by the said section, we do not see how it is possible to hold that, after such confirmation by the Commissioner, and after such publication of the register in the *Gazette*, it has no efficacy whatsoever.

Section 26 of the Act, as already noticed, states that, after the register has been prepared and published, it shall be conclusive evidence of all matters recorded in such register; and no evidence shall be received that any lands not mentioned in the register are *bhuinhari* or *majhahas*. On turning to the register we find that the lands in suit were recorded as *majhahas* lands, and in the occupation of the Chota Nagpore Estate then in the charge of the Court of Wards. They were not recorded as *bhuinhari* lands but as *majhahas*. The matter thus recorded in the register is conclusive evidence showing that the land was *majhahas* and in the possession of the Court of Wards; and we do not think that it is open to us to say that, because the Special Commissioner did not rightly understand the decision of the Commissioner of the 5th May 1879, and because the register was not prepared by the Special Commissioner in accordance with such orders, it is not conclusive evidence of the matters recorded therein. Indeed, we think, it is not competent for us to discuss whether the Special Commissioner rightly appreciated the decision of the Commissioner of the 5th December 1879, the Special Commissioner's order having been given effect to by the register prepared and confirmed by the Commissioner under s. 25 of the Act.

Upon these grounds we are of opinion that the land recorded in the register as *majhahas* belongs to the plaintiff.

Upon the question of limitation raised between the parties, each side has gone into evidence; but this evidence to our minds is not of a very satisfactory character. There is, however, a passage in the judgment of the Commissioner, dated the 5th May 1879, that Masi Das had been in adverse possession of the lands then claimed by him for many years; and if we were

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in a position [122] in this case to give effect to the decision of the Commissioner, we should have had no difficulty in finding that Masi Das has had adverse possession for more than twelve years: so that the plaintiffs' claim would be barred by limitation. But we are constrained to hold, upon the language of s. 26 of the Act, that the register prepared by the Special Commissioner, and confirmed by the Commissioner, having recorded that the land was in the possession of the Chota Nagpore Estate, represented by the Court of Wards, it is conclusive evidence that the possession was at the time with the Chota Nagpore Estate and not with the defendant [see in this connection *Kirpal Narain Tewari* v. *Sukurmoni* (1)]. This register was prepared, as already mentioned, in 1880; and the suit, having been instituted in 1891, that is to say within twelve years of that date, is within time.

Some stress was laid before us upon the fact of the Court of Wards having received rent from the defendant for four years subsequent to 1880, thereby recognizing his right to hold these lands as *bhuinhari*. But then the plaintiff was at the time a minor, and we do not think that the recognition in this form by the Court of Wards precludes the plaintiff from asserting his title to the lands as *majhahas*.

We think, however, that it is a very hard case for the defendant, for had it not been for the register we should have had no difficulty in holding that he is right in his contention, and that the plaintiff has no right to recover *khas* possession of the lands. But, unfortunately for him, the register recording his tenure and *majhahas* lands having been prepared and published in accordance with s. 25 of the Act, it is not open to us to give him any relief in contravention of the matters recorded therein. Upon these grounds we set aside the decree of the Court below and decree this appeal, but under the circumstances without costs.

J. V. W. *Appeal decreed.*

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[123] CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

CHANDI PERSHAD (*Petitioner*) *v.* EVANS (*Opposite Party*)*
[13th August, 1894.]

Criminal trespass—House trespass—Possession of property the subject of criminal trespass—Penal Code, ss. 441, 442 *and* 448.

C., a ratepayer in a municipality, who had filed a petition against an assessment which in his absence had been dismissed, entered a room where a Committee of the Municipal Commissioners were seated hearing and deciding petitions in assessment matters, ostensibly with the object of presenting a petition for the revision of his assessment. The Chairman of the Committee ordered him to leave the room, and on his refusal to do so he was turned out. Outside the room in the verandah he addressed the crowd complaining that no justice was to be obtained from the Committee. *C.* was prosecuted on these facts at the instance of the Chairman of the Committee and convicted of house trespass under s. 448 of the Penal Code:

Held, that the conviction was wrong, and that no offence had been committed. The prosecution was bound to prove, in order to support a conviction of a charge

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* Criminal Revision No. 405 of 1894, against the order passed by F. W. Badcock, Esq., Sessions Judge of Bhagulpore, dated the 14th of June 1894, confirming the order passed by J. Jarbo, Esq., Deputy Magistrate of Monghyr, dated the 4th of May 1894.

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under s. 441 or 442, that the property trespassed upon was at the time in the possession of a complainant who could compound the offence under s. 345 of the Code of Criminal Procedure, and the complainant had failed to prove that the room was in his possession and had in fact shown that he was merely sitting in it with other persons at the invitation and with the consent of the person, whoever he might be, who had the immediate right to such possession.

Held, further, that even if the complainant could be held to be in possession of the room, there was no evidence of any intent to commit an offence or to intimidate, insult or annoy any person, it appearing that the object of the accused in going into and remaining in the room was to endeavour to induce the complainant and his colleagues to reconsider their decision, the verbal insult on which the conviction was based having been uttered after *C.* had left the room.

[R. 21 B. 536 (538); 12 P. R. 1906 (Cr); U.B.R. (1892-1896) 264 (266); U.B.R. (1897-1901) 352.]

THE petitioner in this case was charged, at the instance of the Rev. Mr. Evans, one of the Municipal Commissioners of Monghyr, with criminal trespass by entering a room in which he and [124] another Commissioner were engaged, sitting as a Committee dealing with appeals in assessment cases. The reason assigned by the petitioner for entering the room in question was that, having been assessed by the Commissioners at a rate which he considered excessive, he filed a petition for revision of the assessment; that his petition had been summarily rejected during his absence; and that he had put in another petition for reconsideration of that order, and had gone to the office for the purpose of ascertaining what order had been passed thereon.

The case was heard before a Deputy Magistrate of Monghyr, who convicted the petitioner of an offence under s. 448 of the Penal Code. The facts of the case, and the grounds upon which the conviction was based, are fully set out in the judgment of the Deputy Magistrate which was as follows:—

" The story told by the complainant, the Rev. Mr. Evans, is that he is a Municipal Commissioner. That on the 18th March 1894 he was sitting in Committee with Dr. Vaughan, Mr. W. Thomas and others. 'The present accused, Babu Chandi Pershad, entered the Committee room, which he had no right to do, in order to present a petition of revision of assessment. We told him that we had considered his petition, and we would uphold the assessment, and we refuse to reconsider our order. Chandi at first refused to go and had to be turned out. Since then Chandi has attended the Municipal office, not taking "no" for an answer, but still persistent in asking us to reconsider the assessments.' On the 6th April matters culminated. Mr. Evans and Mr. Thomas were in Committee in a room in the Municipal Office—a room where none of the outside public are allowed to enter while such Committee is sitting unless specially called by name. Chandi forced his way into this room, uncalled for. Mr. Evans ordered him to leave it, but not listening Chandi walked up to a bundle of petitions and began to pull them about and inspect them. These papers were official records which Chandi had no right to see; he was again asked to desist, and to leave the room, by Mr. Evans, then by Mr. Thomas, and as he set at naught mere verbal orders, Mr. Evans had to leave his chair to have accused turned out. Seeing this Chandi then left the room, but he stood in the doorway and made insulting remarks, gesticulating and addressing the crowd of the public in the verandah, and completely stopping work. Even his own witness admits that he said the Municipal Commissioners were '*Be insaf.*' That they would not call and hear the petitioners who were present, and struck off the petition of those who are

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not present. This, to say the least of it, is insulting. The defence admit that it was forbidden to enter that room (see defence evidence), unless specially called. It is proved that Chandi was not so called. So that the whole case [125] for the prosecution is proved. I would not take it upon me to doubt the evidence of a man like Mr. Evans who for years has been known in this district for his simple straightforward dealing. Indeed, the same may be said of Mr. Thomas too, and the insult must have been of a very decided nature before it could rouse such a mild man as the latter. The accused pleads that he went into the room to learn what had become of his petition. The accused himself contradicts this, for he says that in the presence of Dr. Vaughan he had been told that his petition had been rejected. That was on the 18th March, and yet we find accused worrying the Committee as late as the 6th April, when he knew very well what orders had been passed. Mr. Evans tells me in Court that there are sometimes as many as 600 revision petitions to hear in a day. If every one of these were to do what Chandi did, *i.e.*, to put in a petition first for revision, then when orders were passed on that to put in a second for reconsideration of orders passed on revision, there would be no end to the work. Babu Chandi Pershad is a man with some influence. The natives are like sheep and are only too willing to follow the lead of any noisy malcontent and so obstruct work, and it is quite certain that when private gentlemen give up their time and trouble for the public weal for nothing, the least that constituted authority can do is to see that they are protected from insult and obstruction. It has been urged in defence that no criminal trespass can lie against accused in the case as complainants are not possessors of the room in question. It is but common sense to assert that a room in the rightful occupancy of any person is in their possession for the time being. Chandi Babu quite clearly meant to cause annoyance and to be a nuisance until he gained his point, and finding that he could not gain it he became insulting. It has been a moot point as to what section his offence comes under. The Government pleader does not think the Municipal Committee can be called a Court in this case, and therefore only two sections remain, ss. 504 and 448, Penal Code, and I think the latter more applicable. This is a case that is causing a great deal of attention, and much depends upon it as to whether the Commissioners will be enabled to carry on the work in peace in future, or not, and, this being so, and as Chandi accused is a man who ought to have known so much better, I must pass a severe sentence on him, therefore, under s. 448, Penal Code, I order that he pay a fine of Rs. 200, in default a fortnight's rigorous imprisonment. The accused is a rich man, and it would be useless to give him less, as he would not feel it at all."

The petitioner appealed against this conviction to the Sessions Judge, but his appeal was dismissed. The following was the judgment of the appeal Court:—

"The appellant has been convicted of criminal trespass by going into the room occupied by Municipal Commissioners of Jamalpur while hearing appeals against assessment.

[126] "The appellant's pleader has argued that the appellant being a rate-payer has a right to enter any room in the Municipal Office at any time. This is a preposterous claim. The Municipal Commissioners have a perfect right to make any arrangements they think proper with regard to the room in the office for the purpose of carrying on the work of the Municipality, and it is obvious that if any rate-payer could go into any room just when he liked no office work could go on.

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"The next point is that no one was in possession of the room, but the Municipal Commissioners clearly had possession.

"The next point is that the accused only went to find out what order had been passed on a petition of his, and that he had no intention to annoy any one. The evidence proves clearly that he went into the room, interrupted the business that was going on, and refused to leave when ordered to, and on being ejected addressed the crowd from the verandah, saying he had not had justice.

"As regards the sentence I see that the appellant behaved in a somewhat similar way on a previous occasion, March 18th, and I therefore decline to reduce the fine."

The petitioner then applied to the High Court, under the revisional section, to have the record sent for and the conviction set aside, and a rule was granted on the 17th July by a Bench consisting of Beverley and Banerjee, JJ.

The grounds upon which the rule was applied for, and which are dealt with by the District Magistrate as appearing in the judgment of the High Court, were as follows:—

(1) That the facts found by the learned Deputy Magistrate did not constitute an offence under s. 448, Penal Code.

(2) That the Municipal Boards Assessment Revision Office being a public office the entry of the petitioner into it was not unlawful, and did not in law amount to a criminal trespass.

(3) That the petitioner being a rate-payer of the Municipality, having had an order before the assessment revision Committee, his entry into the said office under the circumstances stated above did not constitute an offence under s. 448.

(4) That there was no rule in law by which a rate-payer was prohibited from entering into the Municipal Committee room, nor was there any evidence in the case that the rate-payers were excluded from the Committee room of the Monghyr Municipality, and the finding of the Deputy Magistrate that a rate-payer had no right to enter into the said room for lawful purposes was bad in law.

[127] (5) That there was no finding, nor was there evidence to support any, that the petitioner was aware that as a rate-payer he was not entitled to enter into the said room for a lawful purpose.

(6) That the said office could not be considered as in possession of any person within the meaning of s. 441, Penal Code.

(7) That in any event, upon the facts and under the circumstances of the case, the sentence was excessive and too severe.

Babu *Dwarka Nath Chuckerbutty* and Babu *Dasarath Sanyal*, for the petitioner in support of the rule.

Mr. *Pugh*, for the opposite party, showed cause.

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

On the 7th of April 1894, the Chairman of the Monghyr Municipality forwarded to the Magistrate of the District a report by Mr. Evans, a Municipal Commissioner, complaining of the conduct of Chandi Pershad, with a request that he might be prosecuted, if in the opinion of the Magistrate any criminal offence had been committed by him. On the 12th, the Magistrate made this order: "The applicability of s. 228, Penal Code, is doubtful. But an offence appears to have been committed

under s. 448, Penal Code. I direct prosecution under that section. To the Joint-Magistrate." The trial was commenced on the 28th, before Mr. Jarbo, a Deputy Magistrate. On that day Mr. Evans himself was examined as complainant, and as for the purpose of what we have to say we accept his statement as absolutely accurate, and as his case cannot, of course, be put higher than he puts it himself, we think it best that he should tell his own story, which is as follows:—

"On the 6th April, I think it was, I and Mr. Thomas and a Native gentleman, whose name has slipped my memory, were sitting as a Revision Committee of the Municipal Board, hearing and deciding petitions. This was in a room adjoining the public office room. The present accused, Babu Chandi Pershad, came into the room uncalled. No one was allowed into the room unless sent for. I had warned this man on the very first day of our sitting. I believe it was the 18th March, Dr. Vaughan being present. Chandi had entered this room of ours and interrupted us. [128] He did so ostensibly to present a petition of revision of assessment. We told him then that having reconsidered the matter we had passed orders upholding the assessment, and we would not alter them. He refused to go and we had to turn him out. Ever since then he has been coming worrying us to reconsider our order and prevented our work going on. On the 6th April he entered our room. He walked round to where the petitions were being sorted on the floor and began pulling them about. As Chairman of the Committee, I ordered him to leave the room. He took no notice of my order and then Mr. Thomas spoke to him. He took no notice of that order either, and I rose and had to turn him out. He then said: '*Yihan kooch insaf nahin hai, sub be-insaf.*' I went back to my chair and resumed work. In the course of ten minutes there was a hubbub in the east verandah. I went out and saw the present accused gesticulating to the crowd and stating that no justice could be obtained. This was in the verandah, and I told him to leave it. He said he had a right to stay there. I called for a constable, then every one left. I called for a constable as accused's manner was insulting to us and exciting to the crowd and I feared a breach of the peace."

Some witnesses were examined on the same day, and a charge was framed, after which the trial was adjourned to the 4th of May for the accused to summon his witnesses. On that day two witnesses were examined for the defence, and the Deputy Magistrate gave his judgment, by which he convicted the accused of an offence uuder s. 448, and sentenced him to pay a fine of Rs. 200, or in default to 14 days' rigorous imprisonment. This judgment was afterwards upheld by the Sessions Judge on appeal, and this rule was obtained from a Division Bench of this Court on the 17th of July to revise the whole proceeding.

In answer to the rule the District Magistrate, Mr. Phillips, has written a letter to the Registrar of this Court which, as we understand it to be his wish that his arguments should be made public, we have had copied here. It is as follows:

"Sir,—In reply to letter No. 2141, dated 19th July 1894, I have the honour to forward the record of the case called for, and to show cause as follows: "A letter from the Deputy Magistrate, Mr. Jarbo, is herewith submitted.

[129] "Grounds: I. Even if it be admitted for the sake of argument that the first and original entry of the petitioner was not with intent to intimidate, insult or annoy, it is clear that, after he had been ordered to

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leave, he remained with one of such intents. The petitioner's conduct appears to have been outrageous and most insulting to the Muncipal Commissioners sitting, Mr. Thomas and the Rev. Mr. Evans. He interrupted and obstructed their work, and as Municipal Commissioners are public servants, the petitioner might have been convicted under s. 186, Penal Code also.

"II—VII. All these grounds have been dealt with by the Deputy Magistrate and the Sessions Judge on appeal. If the petitioner had behaved decently, quietly, and with ordinary respect, probably nothing would have happened. I know of no absolute right to enter a Municipal Office. Accounts are open to the inspection of any tax-payer on a day or days to be fixed in each month (s. 71, Bengal Act III, 1884). The budget is open to inspection for fourteen days at all reasonable times. (Section 73). Then by s. 117, the Commissioners declare at what hours of each day the office shall be open for the receipt of money and the transaction of business. The petitioner, as a matter of fact, did not want to see accounts or to pay in money. The Revision Committee were sitting as a Court in a room, which is set apart for their so sitting. Till quite recently it was used as the Court of the Bench of Honorary Magistrates. I was of opinion that probably s. 228, Penal Code, did not apply, as the Commissioners were not a Court. If they were not a Court, then the provisions in the Procedure Code as to open Courts would not be applicable, and even supposing they were applicable, that would not prevent the Commissioners from making due arrangements for the proper transaction of the business before them. They were absolutely within their rights in directing that only those who were called should come in. The room is a small one and not spacious like a Court. The petitioner begs the issue when he speaks of his right to enter for a lawful purpose. As regards the fine, I have ascertained from the Income Tax Office, that the petitioner pays an income tax of Rs. 143-3-8. He is reputed to be a wealthy man. —I have the honour to be, &c., [Sd.] H. A. D. PHILLIPS, Magistrate."

[130] The broad question we have to consider is whether, upon the facts as stated, the offence of house trespass, as defined in s. 442, Penal Code, has been committed by Chandi Pershad against Mr. Evans. We say against Mr. Evans, because the offence, if any was committed, was not one for which the Commissioners could prosecute and could throw the expenses on the rates under s. 352 of the Municipal Act, but was an offence against the complainant, Mr. Evans alone, which he could himself compound for any satisfaction, pecuniary or otherwise, made to himself, under s. 345 of the Procedure Code. Whether the charge is made under s. 441 or s. 442, the prosecution must prove that the property trespassed upon was at the time in the possession of a complainant who could compound the offence under s. 345 of the Code, and, as this is the case, we think the charge must fail, even if there were no other reason, on the ground that the complainant's own statement, so far from showing that the room was in his possession, shows that it was not, but that he was merely sitting in it with other persons at the invitation and with the consent of the person, whoever he may be, as to which we know nothing, who is in possession of the room in the well understood sense that he is the person to whom the right to immediate possession belongs. But even if it were shown that the room was in the possession of Mr. Evans at the time, or that it was a building used as a human dwelling, a place for worship, or a place for the custody of property, still it would be necessary, under either section, for the prosecution to prove that the accused

trespassed in it, with intent to commit an offence, or to intimidate, insult, or annoy some person who was in possession of the room, and upon Mr. Evans' own statement, it is, we think, apparent that the accused did not enter the room, or remain in it, for any or either of such purposes, but his only object in going and remaining there was to endeavour to induce Mr. Evans and his colleagues to reconsider their decision.

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The appellant's grievance was that his appeal against the assessment had been disposed of in his absence, and as we observe from the judgment that there are sometimes as many as 600 petitions to hear in a day, it may be possible that some of them may not be as fully heard as the appellant would wish. Moreover, the verbal insult which the Magistrate finds constituted a part of the offence **[131]** was, on the evidence, uttered after the petitioner had left the room, and was addressed to the crowd outside.

We are perfectly well aware that it is extremely annoying to be compelled, or even persistently entreated, to reconsider a matter which has been already disposed of, to the best of the ability of the person who has disposed of it, but we must say that this is the first time we ever heard it suggested, that it is a crime or an insult to present a petition of review, even if it is pressed in such a way as to worry and distress the person to whom it is presented, and if the useless consideration of it prevents him from attending to his other business.

We are of opinion that the rule must be made absolute. The conviction will be set aside and the fine, if paid, must be refunded.

H. T. H. *Conviction set aside.*

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*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.**

CHANDI PERSHAD (*Petitioner*) *v.* ABDUR RAHMAN, SUB-OVERSEER, MONGHYR MUNICIPALITY (*Opposite Party.*)* [13th August, 1894.]

Bengal Municipal Act (Bengal Act III of 1884*), s.* 133*—False statement contained in application for license—Municipal Commissioners, power of, to institute prosecution under Penal Code—Penal Code, ss.* 182, 199, 417 *and* 511*—Revisional power of High Court—Power of High Court to interfere in pending proceedings.*

On the 5th May 1894 *C.* applied in writing under the provisions of s. 133 of Bengal Act III of 1884, to a municipality for a license to be granted to him in respect of two carriages and six ponies, and filled up and signed the usual statement required by the section. The sum payable in respect of the license was received, and the license asked for by *C.* was granted to him, and at the same time the statement was sent to an overseer of the municipality for verification. On the 7th May the overseer reported that *C.* had in his possession eight ponies and one horse. On the 8th May the chairman of the municipality passed an order directing *C.* to be prosecuted for making a false statement in the schedule to his statement regarding the number of animals in respect of which he applied for the license. On the 9th May *C.* presented a petition asking that the tax on the three animals might be received, and stating that he did not think he was liable to take out a license **[132]** for them, as they were old and diseased and unfit for work. On the 13th May the chairman passed an order on this application that he had no power to interfere, as the prosecution of *C.* had already been ordered. Meanwhile on the 9th May, a paper was sent to the Magistrate headed "List of municipal cases under Act III of 1884" in which *C.* appeared as charged with an offence

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*Criminal Revision No. 398 of 1894, against the order passed by H. A. D. Phillips Esq., District Magistrate of Monghyr, dated 18th May, 1894.

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under s. 199 of the Penal Code for "filing a false statement, that is to say, putting down in the schedule six ponies only instead of eight ponies and one horse." On the 12th May the Deputy Magistrate directed a summons to issue to *C.* returnable on the 23rd. On the 18th May the District Magistrate passed an order to the effect that the municipality could not institute a prosecution under the Penal Code, but that the Deputy Magistrate had power to do so, and that he should consider the provisions of ss. 182 and 417, read with 511, of the Penal Code, as applicable to the facts of the case. On the 19th May the summons was issued, and the case was heard on the 23rd and 24th May and 19th June, on which date formal charges under ss. 199, 182, and 417-511 of the Penal Code were framed. Thereafter the hearing proceeded till the 16th July, when on an application to the High Court the proceedings were stayed, and a rule issued to show cause why they should not be quashed. It was contended at the hearing of the rule that the High Court should not interfere at that stage of the proceedings under its revisional jurisdiction.

Held, that the High Court has power to interfere at any stage of a case, and that when it is brought to its notice that a person has been subjected, as in this case, for over two months to the harassment of an illegal prosecution, it is its bounden duty to interfere.

Held, further, that it was quite clear that the municipality had no power to institute the proceedings, and that having regard to the provisions of s. 191 of the Code of Criminal Procedure, it did not appear that the Deputy Magistrate, having no private complaint before him, had power of his own motion to institute them; but that whether he had such power or not, the admitted facts of the case did not in law constitute any of the offences with which *C.* was charged, and that the whole proceedings must be quashed.

The Municipal Act is intended to be complete in itself as regards offences committed against the Municipal Commissioners, and there is no indication of any intention to render a delinquent also liable to punishment under the Penal Code. There is no penalty in the Act attached to the omission to make a return under s. 133, and no words in the Act constituting the making a false return a penal offence; and as there are no such words in the Act as are necessary to make the provisions of the Penal Code applicable, the Court has no power to import them. The Municipal Commissioners in such a case have the remedy provided by

[F., 35 A. 58 (60)=10 A.L J. 462=13 Cr.L.J. 769=17 Ind. Cas. 401; 20 B. 543 (545); 11 Cr. L. J. 388=6 Ind. Cas 626=18 P. W. R. 1910 Cr. 12 Cr. L. J. 50=8 Ind. Cas. 1161 (1165)=33 P.R. 1910 (Cr.)=57 P. L. R. 1911; 3 L. B. R. 109 (110); R., 25 C. 233 (234); 38 C. 68 (75)=11 Cr. L. J. 525=7 Ind. Cas. 747; 5 C. L. J. 47 (51)=11 C. W. N. 100; 130 P. L. R. 1901.; D., 10 C. W. N. 322(331, 333); 11 Cr. L. J. 387 (388)=6 Ind. Cas. 624=17 P. W. R. (1910) (Cr.)]

[133] THIS was a rule calling on the opposite party to show cause why certain proceedings pending before the Deputy Magistrate of Monghyr in which Chandi Pershad, the petitioner, was being prosecuted on charges under ss. 199, 182 and 417 read with 511 of the Penal Code, should not be set aside on the ground that they had been improperly initiated, and that upon the admitted facts the charges framed under these sections against the petitioner were unsustainable in law. The rule called on the opposite party also to show cause why the case should not be transferred to some other district.

The facts of the case are fully stated in the judgment of the High Court.

Mr. *Jackson*, Babu *Dwarka Nath Chuckerbutty* and Babu *Dasorath Sanyal* appeared in support of the rule.

Mr. *Pugh* showed cause, and contended that the Court should not interfere under its revisional powers to quash the proceedings pending before the Deputy Magistrate at the stage at which they were and before the Deputy Magistrate had concluded them and come to a finding.

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

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JUDGMENT.

This is a rule obtained on behalf of one Chandi Pershad to show cause why certain proceedings taken against him by the Deputy Magistrate of Monghyr should not be quashed, or why the case should not be transferred to some other district. The facts are these: On 5th May last Chandi Pershad applied to the Municipal Commissioners of Monghyr for a license for two carriages and six ponies, making the usual statement as required by s. 133 of the Bengal Municipal Act III of 1884 of the Bengal Legislative Council. A license for two carriages and six ponies was granted, but at the same time the statement was sent for verification to the overseer, who, on the 7th May, reported that Chandi Pershad had eight ponies and one horse. Thereupon the Chairman of the Municipal Commissioners on the 8th May made an order to "prosecute Chandi Pershad for making a false statement in the schedule regarding the number of animals." On the following day Chandi Pershad presented a petition offering to pay the tax on the other three animals, and pleading that he did not think he was liable to [134] take out a license for them, as they were old and diseased and unfit for work. This petition was laid before the Chairman on the 12th, and on the 13th the Chairman wrote: "Prosecution has already been sent by the Vice-Chairman. Nothing remains in my power to do. I can only write to the Magistrate that if this plea be correct, to deal leniently with him." Meanwhile on the 9th May a paper had been sent to the Magistrate on a printed form and headed 'List of Municipal cases under Act III of 1884 and Bye-laws," in which Chandi Pershad appeared as charged with an offence under s. 199 of the Penal Code, for "filing a false statement, that is to say, putting down in the schedule six ponies only instead of eight ponies and one horse." This paper bears the signature of Abdur Rahman, sub-overseer, Abdul Huq, overseer, and an endorsement "forwarded to the Magistrate for prosecution," which purports to be signed by the Vice-Chairman.

On May 12th an order was made by the Deputy Magistrate, Abdus Salam: "Summon accused under s. 199, Penal Code, and witnesses. Fixed for 23rd instant."

On the 18th May the District Magistrate, Mr. H. A. D. Phillips, recorded the following order on the order sheet:—

"I see Moulvi Abdus Salam was in charge and took petitions on the day this was presented. However, under my general order, he should have brought to my notice an important case like this. The municipality cannot institute prosecution, as offence is under Penal Code and not under Municipal Act or bye-laws. However, Deputy Magistrate had power to institute. The case may remain on his file. Section 182 and ss. 417-511, Penal Code, should also be considered. Section 182 has recently been amended by the Legislature. As the prosecution is of some public importance, I think prosecution should be represented by a pleader. Babu Gunga Churn Mukherji is instructed to appear. I would have authorised the Government Pleader, but that he is also Chairman of the Municipality."

Accordingly, on the 19th, a summons was issued for the appearance of Chandi Pershad on the 23rd, when the witnesses for the prosecution were examined. On the 24th the Deputy Magistrate inspected the ponies and horses and found three of them [135] "diseased and rather unfit for use." On that date he directed that the accused should offer

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defence under ss. 199, 182, and 417-511, Penal Code, and on the 19th June formal charges were drawn up under those sections, and the proceedings dragged on, there being no less than nine postponements, until on the 16th July last they were stayed by the order of this Court.

The rule was obtained on two grounds—(1) that the proceedings were improperly initiated, and (2) that upon the admitted facts the charges framed against the accused are unsustainable in law.

The District Magistrate and the Deputy Magistrate have both submitted explanations to this Court, and we have had the advantage of hearing Mr. Pugh on behalf of the Municipal Commissioners.

On the first point it seems quite clear, as admitted by the District Magistrate, that the Municipal Commissioners had no power to institute the present prosecution. Their powers in this respect are defined by s. 352 of the Municipal Act, and are restricted to the prosecution for offences created by that Act.

Nor does it seem to us that the Deputy Magistrate had any authority to initiate the proceedings. There was no private complaint before him, and it does not appear that he is empowered to take cognisance of offences of his own motion in the manner prescribed by cl. (*c*) of s. 191 of the Code. The District Magistrate appears to admit this, but argues that his taking cognizance of the matter himself under s. 191, cl. (*c*), on the 18th May, was sufficient authority for the continuation of the proceedings.

However that may be, we are clearly of opinion that the facts, as alleged—and we may say at once that there is no dispute about them—cannot in law constitute the offences with which the petitioner before us has been charged.

The broad question which we have to consider is whether a person who, under the provisions of the Municipal Act, is liable to pay the tax for nine horses, but has taken out a license for six only, has committed the offence (*a*) of giving false information as defined in s. 182 of the Penal Code, or (*b*) of making a false statement in some declaration which is by law receivable as evidence, **[136]** as that offence is defined in s. 199, or (*c*) of attempting to commit the offence of cheating, as defined in s. 415. The answer to this question must depend on the obligation which a person who applies for a license to keep horses or other taxable things is under, to state accurately the number of horses, &c., in his possession, the object to attain which he makes the statement, and the legal character and value of the statement when it has been made. This involves the consideration of the provisions of the Bengal Municipal Act, 1884, under which the statement was made. By s. 86 the power is given to the Commissioners to order that this particular tax be levied within the limits of the Municipality, and ss. 133 and 135 prescribe the mode in which the tax shall be collected, while s. 137 imposes the penalty to which a person shall be subject, who keeps a horse or other taxable thing without obtaining a license. By s. 133 the owner of the taxable thing must, within the first month of each half year, forward to the Commissioners a statement in writing, signed by him, of the horses, etc., liable to the tax for which he is bound to take out a license, together with the amount which is payable by him, for the current half year, for the horses, *etc.*, specified in the statement. On receiving this statement and the money the Commissioners must under s. 135 give the applicant the license which he has asked and paid for; they have no power to refuse it in any case, and if at the time

it was applied for the person to whom the application was made knew that the person who was applying for a license for one horse had twenty in his stables, he could not under any provision in this Act refuse the license for the one horse for which the tax was paid.

We are now in a position to decide whether there is any ground for charging Chandi Pershad with an offence under any of the sections of the Penal Code, which have been mentioned in the charge which has been framed against him. Mr. Phillips is in error in supposing that s. 182 has been recently amended. That section is in the same form at this moment as it was when it was originally enacted, but for the purposes of this case we will assume that it has been amended in the way Mr. Phillips imagines, and that as it now stands in the Code, the latter part must be read [137] independently of the earlier portion, so that a person who gives false information to a public servant intending to cause him to do, or omit, something which he ought not to do, or omit, if the truth were known to him, is guilty of an offence under the section. On this assumption it is impossible to bring the present case within the section, because the action of the public servant must of necessity be the same, whether he believed the statement to be true or knew it to be false. In either case the only thing which he is authorised by the law to do is to take the money and give the license which is applied for in exchange for it, and this is in fact what was done here. We suppose the suggestion is that the public servant to whom the application is made may be induced, by the statement contained in it, to omit to make an inspection of the applicant's premises under the powers of s. 140. But the Commissioners cannot make an inspection under that section, unless they have reason to believe that something will be found for which the owner is liable to the tax, and for which a license has not been taken out, and it is obvious that the form of this application could not have the effect of inducing them to make or refrain from making an inspection which they could only make when they were induced to do so by some cause entirely independent of such an application, as that alone could not reasonably raise such a suspicion or dispel it if it were raised by some other cause.

We now come to s. 199 of the Penal Code. That section subjects any person who makes a false declaration, which declaration may be used as evidence of the matters stated in it, to the penalties for perjury, that is to say, renders him liable to rigorous imprisonment for three years. It needs a very slight acquaintance with the Indian Evidence Act, and with the principles of law which are embodied in it, to satisfy any one that the statement made by the accused for the purpose of taking out these licenses is no evidence at all against any one but himself, and could only be evidence against himself as proving an admission by him, that at the time he made it he had in his possession six horses, and no more, for which he was liable to pay the tax. It is obvious that it is impossible to strain the words of the section so as to bring such a case within them, and we are clearly of opinion that on the [138] facts alleged here no charge can be framed against Chandi Pershad under s. 199.

The only other section which is mentioned in the charge is s. 417 read with s. 511, and the argument by which it is sought to bring the case under that section is, we think, even more impossible than that which relates to the other sections. It is well recognised law that a person cannot be convicted of attempting to commit an offence unless the offence would have been committed had the attempt proved successful

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[*The Empress* v. *Riasat Ali* (1)], and it is extremely difficult to understand what it is suggested that Chandi Pershad had tried to do which he had not succeeded in doing. He applied for a license for six horses and obtained it, but of course it cannot be said that he cheated any one by doing that. If the suggestion is the same as that which we suppose is made with reference to s. 182, it must fail for the same reason, as the applicant cannot have tried to dishonestly induce the Commissioners to omit to inspect his premises, merely by presenting his application in this form, when the fact is that they had no power to inspect them at all, unless there was some other reason which justified them in doing so.

We feel bound to say that Mr. Pugh did not attempt to contend that the charges framed against Chandi Pershad could be sustained. He rather confined himself to urging the impropriety of our interference at a time when the case is still pending before the Magistrate. There can be no doubt, however, that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected for over two months to the harassment of an illegal prosecution, we think it is our bounden duty to interfere.

The fact is that the Municipal Act itself provides the penalty for the omission to take out a license and empowers the Municipal Commissioners to take the necessary steps for enforcing that penalty. In the present case the Municipal Commissioners did not think fit to avail themselves of the remedy given them by the Legislature, but instituted a prosecution, which they have no power to institute on charges that cannot be sustained, and **[139]** the Magistrate of the District has lent the sanction of his authority to support this illegal action. The Municipal Act is intended to be complete in itself as regards offences committed against the Municipal Commissioners; and we can find no indication in the Act of any intention to make a delinquent also liable to punishment under the Penal Code. No penalty is attached to the omission to make a return under s. 133, and there are no words in the Act constituting the making a false return a penal offence. Whenever there is an intention to apply the provisions of the criminal law to acts authorized or required by particular statutes, that intention is always made clear by express words to that effect. Instances of this may be found in the Cess Act (Bengal Act IX of 1880), s. 94; in the Estates Partition Act (Bengal Act VIII of 1876), ss. 148; in the Income Tax Act II of 1886, ss. 35 and 37; in the Land Acquisition Act I of 1894, s. 10, and in many other Acts. In the Bengal Municipal Act there are no such words as are necessary to make the provisions of the Penal Code applicable, and we have no power to import them. The Municipal Commissioners have their remedy in a case like this under the Act itself. The remedy may not in their opinion be sufficient, but they are not entitled to go beyond it.

For these reasons we make the rule absolute and set aside the entire proceedings taken against the petitioner in this case.

Rule made absolute and proceedings quashed.

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(1) 7 C. 352.

22 C. 139.

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CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Beverley.

PARYAG RAI (*Complainant*) *v.* ARJU MIAN AND OTHERS (*Accused*).*
[18th August, 1894.]

Cattle Trespass Act (*I of* 1871), *s.* 22—*Illegal seizure of Cattle—Theft—Compensation—Fine—Imprisonment in default of payment of Compensation—Criminal Procedure Code* (*Act X of* 1882), *s.* 386—*Penal Code*, *s.* 378.

[140] An accused was found to have loosed the complainant's cattle at night from a cattle pen, and to have driven them to the pound with the object of sharing with the pound-keeper the fees to be paid for their release. He was proceeded against under Act I of 1871 (The Cattle Trespass Act), and under the provisions of s. 22 ordered to pay compensation to the complainant, and in default to undergo one month's rigorous imprisonment. *Held*, that s. 22 was inapplicable to the facts of the case, and that the order must be set aside. On the facts it was not a case of "illegal seizure and detention" of cattle, but rather one of theft, as all the elements of that offence were present, and the accused should have been charged with and tried for that offence. *Held*, further, that the sentence of imprisonment in default of payment of the compensation was not warranted by law. Compensation may be levied as a fine, and the ordinary mode of levying fines is laid down in s. 386 of the Code of Criminal Procedure. The law nowhere provides that fines may be levied by means of imprisonment.

[Cited, 3 L.B.R. 32; R., 22 C. 669 (678); 2 Weir 320.]

THIS was a reference made by the District Magistrate of Monghyr, recommending that an order passed by a Sub-Divisional Magistrate under s. 22 of the Cattle Trespass Act, 1871, should be set aside.

The material portion of the letter of reference was as follows:—

"Under s. 438, Act X, 1882, I herewith transmit the record of the case noted in the margin to be laid before the High Court with the following report:—

2. "*Brief analysis of case*—

"The accused persons unloosed buffaloes from a *halthan* (cattle-pen) at night and took them to the *pachhier* (pound) and there impounded them. This was done with the object of sharing with the pound-keeper the fines which would be paid for the release of the cattle.

3. "*The Order recommended for Revision*—

"The order under s. 22, Act I, 1871.

4. "*The error on a point of law.*

"I think the sentence is inadequate, the offence is a serious one. All the elements of theft were present, and I think, the accused should be sentenced to three months' imprisonment under s. 379, Penal Code; or at any rate that they should be put on their trial for theft.

5. "*The grounds on which the order should be revised*—

"That the sentence is inadequate and not sufficiently deterrent [141] to put an end to this pernicious 'touting' system I herewith forward the explanation of the Joint Magistrate. I fully agree with the explanation up to a certain point. There may be doubts where an animal was caught, whether it actually had done damage or not, and so on. But if an animal is tied up in its pen at night, and deliberately unloosed and taken away, I see no

* Criminal Reference No. 231 of 1894, made by H.A.D. Phillips, Esq., District Magistrate of Monghyr, dated the 10th of August 1894, against the order passed by H. Wheeler, Esq., Sub-Divisional Magistrate of Beguserai, dated 21st July 1894.

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reason why the criminal should escape from the consequences of his act, which is pure theft. A man might enter a house and take away cattle and there would be an offence under s. 457, Penal Code. It is often extremely difficult in this country to say whether there has or has not been a taking from a house. In this connection it may be remarked that it is curious the Legislature has taken such pains to protect property in houses, when the people's principal wealth, cattle, is kept out of doors. To enter a *halthan* to steal or poison cattle would only be punishable with three months under s. 447. In the present case the accused committed offences under s. 379, and there are exceptional reasons for prosecuting them under that section so as to put an end to the 'touting' system, which is such a curse to an agricultural community. Offences under s. 22 of Act I, 1871, are most difficult to prove, and an occasional award of compensation is not sufficient to deter pound-keepers from employing lads to prowl about at night and unloose cattle, and bring them to pounds.

"I believe that illegal seizure (that is 'a seizure adjudged illegal') is not a criminal offence, and that a sentence of fine or imprisonment cannot be passed in default of payment of the compensation awarded. [*In the matter of Ketabdi Mundul* (1), *Shaik Hussain* v. *Sanjivi* (2)]."

In his explanation, referred to in the reference, the Sub-Divisional Magistrate gave the following as his reason for dealing with the case under the Cattle Trespass Act :—

"With reference to the second para. of your letter it had not struck me at the time to treat the case as one of theft. Being a specialised kind of offence I naturally referred to the special section made to fit it. In a certain sense every case of unlawful impounding might be treated as theft, as they all would involve **[142]** unlawful moving of property with a view to dishonestly taking it out of a person's possession without his consent. I had imagined that when special laws were directed against special offences the latter should be tried under them.

"I admit however that treating the case under s. 379, Penal Code, would have had this advantage that it would have been possible to send the men to prison. I certainly think they should have gone to prison, which was impossible under s. 22, Act I of 1871. If a fine had to be resorted to, I had to reduce it to that amount which I thought the accused might reasonably be able to pay."

No one appeared on the hearing of the reference.

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

JUDGMENT.

The accused in this case are found to have loosed the complaintant's cattle at night and to have driven them to the pound with the object of sharing with the pound-keeper the fees to be paid for their release; and they have been ordered by the Joint Magistrate to pay compensation under s. 22 of Act I of 1871 (Cattle Trespass Act), and in default to suffer one month's rigorous imprisonment.

The District Magistrate refers the case to us on the ground that the penalty inflicted is inadequate, and he asks us to quash the proceedings and direct that the accused be tried for theft.

We are of opinion that the proceedings of the Joint Magistrate must be set aside, inasmuch as on the findings this was not a case of illegal

(1) 2 C.L.R. 507. (2) 7 M. 345.

seizure and detention of cattle under the Cattle Trespass Act, and therefore s. 22 of that Act is not applicable. We agree with Mr. Phillips that in this case all the elements of theft are present, as that offence is defined in s. 378 of the Penal Code. We accordingly set aside the proceedings of the Joint Magistrate, and direct that the accused be placed on their trial charged with an offence under s. 379, Penal Code.

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Mr. Phillips also appears to us to be right in the opinion that the sentence of imprisonment awarded in default of payment of the compensation is not warranted by the law. This was held in [143] the case of *In the matter of Ketabdi Mundul* (1). but the other case cited *Shaik Hussain* v. *Sanjivi* (2) is not to the point. The law prescribes that the compensation may be levied as a fine, but it does not say that imprisonment may be awarded in default of payment, and we are not aware of any provision of law which provides that fines may be levied by means of imprisonment. The ordinary mode of levying fines is laid down in s. 386 of the Code of Criminal Procedure. This part of the Joint Magistrate's order therefore is clearly illegal (3).

H. T. H. *Order set aside.*

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APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

BAID NATH DAS (*Defendant*) v. SHAMANAND DAS (*Plaintiff*).*
[31st August, 1894.]

Succession Certificate Act VII of (1889), *s.* 4—*Right to maintain suit without certificate—Suit on mortgage bond by heir—Suit continued by party substituted for plaintiff who has taken out certificate—Interest at high rate—Penalty—Contract Act* (*IX of* 1879), *s.* 74—*Precise sum not named but ascertainable.*

A mortgage bond was executed by the defendant in favour of H, who died, leaving two sons *J* and *S*, the elder of whom *J* took out a certificate to collect the debts of his father, and instituted a suit on the bond in which he asked both for sale of the mortgaged property and for a personal decree against the defendant. Whilst the suit was pending *J* died, and *S* was allowed to be substituted in his place as plaintiff. A decree was made for sale of the property, but the personal relief was not granted, as it was held to be barred by lapse of time: *Held*, that this was not "a decree against a debtor for payment of his debt" within the meaning of s. 4 of the Succession Certificate Act (VII of 1889). *Roghu Nath Shaha* v. *Poresh Nath Pundari* (4) and *Kanchan Modi* v. *Baij Nath Singh* (5) approved. The suit was therefore maintainable notwithstanding that no certificate had been taken out by *S*. *Semble.*—It is doubtful whether that Act would apply at all to [144] the case of a person who has been substituted as plaintiff for one who, having taken out a certificate, has died pending the suit.

The mortgage bond contained the following stipulations as to interest: "I will pay interest for the said amount at the rate of Rs. 1-4 per cent. *per mensem*, and at the end of a year from the date of the bond, I will pay the whole amount of interest due on the principal for that year. If I do not pay the interest in this way at the end of each year, I will be guilty of neglect. You will by instituting suit realize interest upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the bond at the rate of Rs. 3-2 per cent. *per mensem* from the mortgaged property and from me, my heirs, assigns, and representatives and from my other properties. I will

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*Appeal from Original Decree No. 193 of 1893, against the decree of Babu Bulloram Mullick, Subordinate Judge of Cuttack, dated the 4th of April 1893.

(1) 2 C.L.R. 507. (2) 7 M. 345.
(3) See *Ramjeevan Koormi* v. *Doorga Charan Sadhu*, 21 C. 979.—*Ed. note.*
(4) 15 C. 54. (5) 19 C. 336.

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continue to pay interest upon the principal for every year from the date of the bond at the end of that year so long as the amount of the bond is not paid. In default of payment you will act according to the conditions stated above. I will repay this money within the three months from date and redeem the mortgage property and mortgage bond...........If I fail to pay up the principal money within the said specified time. I will continue to pay up interest upon the principal at the rate of Re. 1-4 per cent. according to the said stipulation in the bond up to the date of the institution of the suit, and from the date of institution of the suit to that of the decree, and from the date of the decree to that of the realization of the amount": *Held*, that the plaintiff was not entitled to the higher rate of interest, it being in the nature of a penalty within the meaning of s. 74 of the Contract Act. [*Kala Chand Koyal* v. *Shib Chunder Roy* (1) referred to] and this was so within the meaning of that section, although no sum was named, because such sum was at once ascertainable.

[F., 28 B. 630 (632) = 6 Bom. L.R. 582 (583); 29 C. 43 (51); R., 26 C. 839 = 4 C.W.N. 558; 20 M. 232 (234); 29 M. 77 (78); 7 C.L.J. 658 = 12 C.W.N. 145 ; 2 C.W.N. 234 (236); 36 M. 229 = 18 Ind. Cas. 417 (435) = 24 M.L.J. 135 (166) = 13 M.L.T. 20; U.B.R. (1892—1896), Vol. II, p 300 (301); 20 Ind. Cas. 667 (669); D., 13 Ind. Cas. 624 (525).]

THIS was a suit on a registered mortgage bond for Rs. 3,000 executed on the 9th April 1880 by the defendant in favour of the plaintiff's father, under which the amount was payable three months after date of the bond. The bond bore interest at the rate of Re. 1-4 *per mensem*, and there was a stipulation in the bond for the payment of the whole interest for the year on the last day of each year from the date of the bond, and on default of such payment that the mortgagee might realize interest "upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the mortgage bond at the rate of Rs. 3-2 per cent. *per mensem* from the mortgaged property and from me, my heirs, assigns, and representatives, and from my other properties."

The plaintiff had two sons, Jagadanand Das and Shamanand **[145]** Das, and on his death in 1885 his son Jagadanand, through his mother and certificated guardian Saraswati Debi, took out a certificate in order to collect his father's debts.

The suit was brought on the 28th March 1892 for the principal Rs. 3,000, and interest thereon for 11 years 11 months and 12 days from 9th April 1880 to 27th March 1892 at the rate of Rs. 3-2 per cent. *per mensem*, Rs. 13,465-10, making in all Rs. 16,465-10; and the plaint prayed that the amount might be decreed to be paid within a fixed time, together with costs of the suit, and that in case of non-payment the mortgaged property should be sold, and the amount realized from the sale proceeds; and if they should be insufficient the balance should be realizable from the defendant and from his property other than the mortgaged property.

The defence was that the suit was not maintainable as the plaintiff's brother had not been made a party; that by the custom in the defendant's family the eldest son was *malik*; "no one has any transferable right or interest in the family properties; the plaintiff is not entitled to a mortgage decree against the property mortgaged, as it is an ancestral family property, and not transferable"; that the plaintiff was only entitled to interest at the rate of Re. 1-4 *per mensem*, the stipulation for payment at the rate of Rs. 3-2 being a penalty and not enforceable by the Court; that the plaintiff was not entitled to a decree for interest for an amount larger than the principal, and that he was not entitled to the other relief prayed for, as in respect of that the suit was barred by limitation, more than six years having elapsed from the date of the bond.

(1) 19 C. 392.

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Jagadanand Das died on the 18th August 1892, and on the 4th April 1893 his brother Shamanand who was then a minor was allowed to be substituted in his place as plaintiff.

The judgment of the Subordinate Judge was as follows :—

"The suit of the plaintiff is on a mortgage bond. The execution of the instrument by the defendant and receipt of consideration are not denied by defendant. There is also positive evidence to prove those facts. The contentions of the defendants are :—(1) That the plaintiff Shamanand is not a minor ; **[146]** (2) that the rule of primogeniture prevailing in defendant's family bars the sale of the mortgaged property ; (3) that without a certificate under the Succession Certificate Act plaintiff is not entitled to a decree.

"In regard to the first plea it is negatived by the evidence adduced by defendant which shows that the plaintiff Shamanand is still a minor. The second objection should also be overruled. There is no evidence worth the name to support the custom set up by the defendant. The mortgage bond on the other hand disproves the custom in the clearest manner and estops defendant from setting it up.

"The third objection is that the suit cannot be maintained without a certificate. The case of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1) is an authority for holding that a mortgage debt does not fall within the scope of the Succession Certificate Act. The present suit is based on the rule of survivorship and not succession, and therefore the case of *Venkataramanna* v. *Venkayya* (2) is applicable. Hence I hold that the suit is maintainable without a succession certificate. The personal reliefs claimed in the plaint are barred by limitation and should be disallowed. Let an account be taken of the interest in terms of the mortgage bond. The mortgaged property will be sold if defendent do not pay the principal and interest to be hereafter ascertained and costs within six months from the date the decree is signed.

From this decision the defendant appealed, the only material ground being that the suit was not maintainable, the plaintiff Shamanand not having taken out a certificate under the Succession Certificate Act, and that the clause in the bond as to interest at the higher rate, and as to compound interest, was a penal clause and effect ought not to be given to it.

Mr. *Barrow*, Babu *Saroda Charan Mitter*, and Babu *Srish Chunder Chowdhri*, for the appellant.

Dr. *Rash Behari Ghosh* and Babu *Monomotho Nath Mitter*, for the respondent.

The arguments and cases cited are sufficiently noticed in the judgment.

[147] The judgment of the Court (GHOSE and GORDON, JJ.) was as follows :—

JUDGMENT.

This was a suit to enforce a mortgage bond. The mortgage was executed in favour of one Haribar Prasad. He died, leaving two sons, Jagadanand Das and Shamanand Das, both of them being minors at the time.

The suit was instituted on the 28th March 1892 by Jagadanand Dás against the mortgagor, Baid Nath Das, for recovery of the money covered by the mortgage bond, and he asked that the sum due might be realized

(1) 15 C. 54. (2) 14 M. 377.

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by sale of the mortgage property, and he further prayed that, in the event of the mortgage property being found insufficient to liquidate the entire amount, the balance might be recovered from the defendant personally and from his other properties.

We should here mention that Jagadanand Das, who was the elder of the two brothers, stated in his plaint that he was the sole heir of his father, and that he had taken out a certificate of heirship in order to enable him to collect the debts due to his father's estate.

The defendant in his written statement pleaded that the suit was not maintainable, because the plaintiff had not joined his brother as co-plaintiff in the suit, and that the interest sought to be recovered by the plaintiff, namely at the rate of Rs. 3-2, was a penalty, and could not therefore be allowed. He further set up a custom that prevailed in his family, under which he alleged no member of the family was entitled to mortgage the family property.

It appears that pending the suit Jagadanand Das died on the 18th August 1892. Thereupon, his brother Shamanand Das, who was still a minor, through his mother and guardian, asked to be substituted as a plaintiff in the place of his deceased brother. Some other persons, who are half brothers of Harihar Prasad, also applied to be made plaintiffs in the suit, but it is sufficient to dismiss their application by stating that the Court below held that it was beyond time, and therefore it could not be acceded to. So far as Shamanand Das was concerned the Subordinate Judge allowed him to be substituted as plaintiff in the case in the place of his brother Jagadanand Das, he being of opinion that, being a **[148]** minor, his (Shamanand's) application was not barred by the Law of Limitation.

The Subordinate Judge, upon the case coming up for trial, dealt with the contentions that were then raised before him, and he states that the contentions were—*first*, that the plaintiff Shamanand was not a minor; *secondly*, that the rule of primogeniture prevailing in defendants' family was a bar to the sale of the mortgaged property; and, *thirdly*, that without a certificate under the Succession Act, the plaintiff was not entitled to a decree. He negatived all these objections, and held that the plaintiff was entitled to a decree charging the mortgaged property for the satisfaction of his claim, but that the personal relief claimed in the plaint against the defendant could not be allowed, as it was barred by the Law of Limitation. In regard to the question of interest that was raised before him, the Subordinate Judge held that the plaintiff was entitled to claim interest upon the principal only at the rate of Re. 1-4 as agreed upon, and not the higher interest of Rs. 3-2, but that he could recover interest at that rate upon the interest accruing upon the principal, that is to say, that he was entitled to compound interest at the higher rate of Rs. 3-2 mentioned in the bond. We observe, however, that the decree that was drawn up under the signature of the Subordinate Judge allows interest at the higher rate upon the principal from the date of the institution of the suit.

Against this decree the defandant has preferred this appeal.

The first point that has been discussed before us by the learned Vakil for the appellant is that Jagadanand Das, the original plaintiff, was not entitled to sue without joining his brother, Shamanand Das.

As to this matter, it is sufficient to say that, though it was raised in the written statement, it was not insisted upon at the trial before the Subordinate Judge, nor has it been raised in the petition of appeal presented to this Court. It raises simply a question of non-joinder of

parties, but it does not really affect the merits of the case, more particularly when upon the death of Jagadanand Das, Shamanand Das has been substituted as plaintiff in his place, and the suit has been allowed to proceed at his instance.

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[149] The next ground that has been raised before us on behalf of the appellant is that the plaintiff was not entitled to get a decree without a certificate of succession as provided by s. 4 of the Succession Certificate Act.

As to this matter, it appears that, although a decree was asked for by the plaintiff both against the mortgaged property and against the debtor personally, still the only decree that was pronounced by the Court below was a decree against the mortgaged property. No relief was granted against the defendant personally. Section 4 of the Succession Certificate Act VII of 1889, provides:

"No Court shall—

(*a*) Pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof; or (*b*) proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt;" and so on.

The question here is whether the decree that has been passed by the lower Court is a decree against "the debtor for payment of his debt." This question seems to have been considered in two cases before this Court. In the case of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1), where the question was raised with reference to the language of s. 2 of Act XXVII of 1860, Wilson, J., in delivering the judgment of the Court, observed as follows: "The words of the section are that 'no debtor of any deceased person shall be compelled in any Court to pay his debt to any person' without a certificate. It seems to me that this is limited to suits against a 'debtor,' and can have no application to a suit against a purchaser of a mortgaged property, who is in no sense a debtor; *secondly*, it seems to me that the words are limited to cases in which a Court is asked to 'compel a debtor to pay,' that is to say, to make a personal decree against the debtor. To me it seems to have no application to a suit such as the present."

The Act which the learned Judges had then to consider was no doubt an Act different from that with which we are concerned in [150] the present case; but it will be observed that the language of s. 2 of Act XXVII of 1860, so far as the question which arises in this case is concerned, is very similar to the provisions of s. 4 of the Succession Certificate Act.

In a more recent case, *Kanchan Modi* v. *Baij Nath Singh* (2) where the question as to the construction of s. 4 of the Succession Certificate Act, came to be discussed, this Court observed as follows:—

"Section 4 says: 'No Court shall pass a decree against a debtor for payment of his debt,' and so on. A mortgagee might ask for a decree against the person of the debtor, but the Court is not bound to make a personal decree; it might, if the facts permit, make a decree only against the property mortgaged by the defendant; and in the circumstances of the present case it was quite open to the Court of first instance—in fact, it was its duty—to refrain from making a personal decree and to pass a decree charging the property in the hands of the defendants, second

(1) 15 C. 54. (2) 19 C. 336.

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party, for satisfaction of the claim of the plaintiffs. The relief that the plaintiffs asked for in the suit was not for recovery of the debt, but as observed by Sir Barnes Peacock in the Full Bench decision in *Sarwar Hossein Khan* v. *Gholam Mahomed* (1), it was a suit for the recovery of an interest in immoveable property. The question that the learned Judges had to decide in that case was no doubt a different question. It was one of limitation, but we take it, as it has always been understood in this Court, that a suit to enforce a charge against immoveable property is a suit for the recovery of an interest in immoveable property ; and if that be the correct view to take, it seems to be obvious that the plaintiffs were entitled, notwithstanding the absence of a certificate under the Succession Certificate Act, to sustain the decree that had been pronounced in their favour by the Court of first instance, that being a decree charging the immoveable property in the hands of the second party defendants."

There, no doubt, no personal relief was asked for against the mortgagor, and the decree that was allowed by the Court below was a decree against the mortgaged property in the hands of the [151] assignee of the mortgaged premises, but still the question that we have to decide in this case came, though incidentally, to be considered by Judges who dealt with that case.

In the case of *Janki Bullav Sen* v. *Hafiz Mahomed Ali Khan* (2) a somewhat different view seems to have been adopted ; but it will be observed upon a consideration of that case that the precise question which we have to decide in the present case was not then discussed.

In the present case, no decree was passed by the Court below against the debtor personally, and the only relief that has been granted by that Court to the plaintiff is a relief against the property mortgaged ; and though no doubt the property is liable to be sold only in the event of the defendant failing to pay the money due under the mortgage by the time fixed by the Court, it could hardly be said that that is a decree against the debtor for payment of his debt, properly so called. We are inclined to think that the construction put upon the words of s. 2 of Act XXVII of 1860, which are in effect very similar to s. 4 of the Succession Certificate Act, by Wilson, J., in the case to which we have already referred, is the right construction, and may be adopted in the present case.

There was another view which was presented to us by the learned Vakil for the respondent with reference to s. 4 of the Succession Certificate Act, and that is that it has no application to a case like the present where the original plaintiff had obtained a certificate under the Succession Certificate Act, and another person was, during the pendency of the suit, substituted in his place as the heir of the deceased plaintiff. It is perhaps not necessary, in the view that we have already expressed, to decide this question, but it seems to us that it is extremely doubtful whether the Legislature ever intended that this section should apply, not only to a case where a person claims to recover money under the title of succession to the original creditor, but also to a case, where, upon the death of that person during the pendency of the suit, some other person is substituted in his place as plaintiff in the cause.

[152] We therefore overrule the contention of the defendant on this head.

The third objection that was raised before us was in regard to the interest allowed by the Court below. The words of the mortgage bond, so far as they bear upon this matter, are as follows :—

(1) B.L.R. Sup, Vol. 879 =9 W.R. 170. (2) 13 C. 47.

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"I will pay interest for the said amount at the rate of Re. 1-4 per cent. *per mensem*. And at the end of a year, *i.e.*, 365 days, from the date of the mortgage bond, I will pay the whole amount of interest due on the principal for that year. If I do not pay the interest in this way at the end of each year, I will be guilty of neglect. You will by instituting suit realize interest upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the mortgage bond at the rate of Rs. 3-2 per cent. *per mensem*, from the mortgaged property and from me and from my heirs, assigns and representatives and from my other properties. I will continue to pay interest upon the principal for every year from the date of the mortgage bond at the end of that year as long as the mortgage bond is not paid. In default of payment you will act according to the condition stated above. I will repay this money within three months from date and redeem the mortgaged property and mortgage bond. I will get the payments of interest or of principal endorsed (as often they will be made) on the back of the mortgage bond. I will take no separate receipt or releases, nor will produce any (in evidence). If produced they will be at once rejected by the Court as inadmissible. If I fail to pay up the principal money within the said specified time I will continue to pay up interest upon the principal at the rate of Re. 1-4 per cent. according to the said stipulation in the bond up to the date of the institution of the suit, and from the date of institution of the suit to that of the decree, and from the date of the decree to that of the realization of the amount."

As already mentioned, the Court below has held that the plaintiff is not entitled to recover the higher rate of interest, namely, Rs. 3-2, upon the principal amount, but that he is entitled to such interest upon the interest accruing year after year. The question whether the mortgagee has a right to compound interest **[153]** at the higher rate of Rs. 3-2 is not free from difficulty, but having regard to the judgment of a Full Bench of this Court in the case of *Kala Chand Koyal* v. *Shib Chunder Roy* (1) delivered by Pigot, J., we think that the plaintiff is not entitled to this higher rate of interest, it being in the nature of a penalty within the meaning of s. 74 of the Contract Act. In that case, the provision in the bond was that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid at a higher rate from the date of the bond up to date of realization ; and the question that was discussed was whether this provision amounts to a provision in the nature of a penalty such as under s. 74 of the Contract Act could not be enforced. The majority of the Court followed the decision of this Court in the case of *Mackintosh* v. *Crow* (2), and held that the said provision amounted to a stipulation for payment of a penalty, and therefore it could not be given effect to. The learned Judges had, in deciding that case, to consider the correctness of another judgment of this Court, namely, in the case of *Baij Nath Singh* v. *Shah Ali Hossein* (3), and Pigot, J., with reference to this case and to a case decided by the Madras High Court, made the following observations :—

"I think that the objection made in the judgment in *Baij Nath Singh* v. *Shah Ali Hossein* (3) that cases such as the present do not come within s. 74 of the Contract Act, because no sum is named, is not one to which effect ought to be given. By the fixing of a rate of interest the

(1) 19 C. 392. (2) 9 C. 689. (3) 14 C. 248.

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sum to become payable, at any rate, as the Madras High Court says, at the time when default is made, is fixed, and this is what the section contemplates.

"Upon the second question I think that when the provision in the contract in question amounts to a provision for penalty (or, which is the same thing, stipulates for a sum in case of breach within the meaning of s. 74) that goes to the whole sum which may accrue due under the provision, although it may be that by non-payment for an indefinite time the aggregate amount ultimately payable may greatly exceed the amount—the [154] fixed and ascertainable amount—to be due at time of default. I think they cannot be separated, and that s. 74 applies to all, that is, that it applies to the money claimed at the increased rate of interest from the date of the bond until realization."

These last observations were made especially with reference to the question that was raised in the case, whether the plaintiff could not recover the higher rate of interest from and after the due date, and it was held that the provision as to the increased interest was a provision which could not be separated, and that therefore s. 74 of the Contract Act applied both to the period before the due date as also to the period subsequent thereto.

It was contended before us by the learned Vakil for the respondent, relying upon certain observations of this Court in the case of *Mangniram Marwari* v. *Rajpati Koeri* (1) that s. 74 of the Contract Act had no application to this case, because no sum was named as the amount to be paid in the event of a breach of the contract to pay; that the amount would vary with the time for which payment was withheld; and that, with regard to compound interest, there was but one rate stipulated, *viz.*, Rs. 3-2, and that therefore it could not be regarded as a penalty. We observe, however, that the first portion of this argument, as we understand it, is the same that was used by Mitter, J., in the case of *Baij Nath Singh* v. *Shah Ali Hossein*, but it does not seem to have been accepted as correct by the majorit yof the Judges who composed the Full Bench in the case of *Kalo Chand Koyal* v. v. *Shib Chunder Roy*. They rather adopted the view of the law that was expressed by the Madras High Court in the case of *Nanjappa* v. *Nanjappa*(2). The learned Judges in that case, with reference to this question, observed as follows:—

"It is said there is in the present case no sum *named* within the meaning of s. 74 of the Contract Act, and that therefore that section is not applicable. To that argument we would reply that, though no sum is named in rupees, the extra sum payable is fixed and ascertainable beforehand or at any rate at the time when default is made to hold that more than this is required, and that it is necessary that the exact sum should be mentioned in the [155] bond, is in our judgment to countenance an easy mode of avoiding the effect of the section altogether."

We may add with reference to the case of *Mangniram Marwari* v. *Rajpati Koeri*, which was relied upon by the learned Vakil for the respondent, that the terms of the bond which the learned Judges were then called upon to consider are not identical with the terms of the bond in the present case.

It will be observed that the stipulation between the parties was that the interest would be payable at the end of each year, and that in default of payment of such interest at the rate of Re. 1-4 per cent. *per mensem*; the

(1) 20 C. 366. (2) 12 M. 161.

mortgagor should have to pay compound interest at the increased rate of Rs. 3-2 per cent. *per mensem* ; and that in default of payment of interest at the end of each year the creditor would be entitled to sue for the interest at the increased rate. So that, although no sum was named in the mortgage itself as would be payable upon a breach of the covenant on the part of the mortgagor, still the amount which the mortgagee would be entitled to recover from the mortgagor in the event of default of payment of interest at the end of each year was at once ascertainable, and in this view of the matter we think that the provision with which we are concerned falls within the scope of s. 74 of the Contract Act; and we do not see it is possible to divide this provision into two parts, one of the parts being applicable to the principal, and the other part to the interest. The whole provision, as it seems to us, was one entire provision in the nature of a penalty which the mortgagor incurred in the event of default on his part to pay the stipulated interest at the end of each year; and though in regard to compound interest there is but one rate (Rs. 3-2) mentioned, it is a rate higher than that at which interest was payable, if there was no breach of the covenant, and in this sense may well be regarded as a penalty.

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Upon these grounds we are of opinion that the mortgagee is not entitled to enforce the penal provision in the mortgage bond as regards the higher rate of interest.

While, therefore, we think that the decree of the Court below should in the main be confirmed, we are of opinion that it should [156] be modified so as to allow the plaintiff to recover interest at the rate of Rs. 1-4 per cent. *per mensem* upon the principal from the date of the bond to the date of realization, as also compound interest at the same rate; and we direct that a decree be drawn up in accordance with this declaration in terms of the Transfer of Property Act. Costs in proportion.

J. V. W. *Decree modified.*

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22 C. 156.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

CHHATRADHARI SINGH (*Defendant*), AND ON HIS DEATH HIS SON AND HEIR KUNJ BEHARY SINGH *v.* SARASWATI KUMARI. (*Plaintiff*).* [20th July, 1894.]

Ghatwali tenure—Right of succession to ghatwali tenure in Beerbhoom—Regulation XXIX of 1814, s. 2—"*Descendants*" *meaning of—Impartible property—Separate property—Hindu law, Mitakshara.*

Ghatwali tenures in Beerbhoom are tenures to be held in perpetuity and are descendible from generation to generation subject to certain conditions and obligations, and it would be inconsistent with the true character of these tenures to hold that the Legislature intended that they should devolve on issue of the body only, and not on heirs generally according to the law which may govern such succession. The word "descendants" therefore in s. 2 of Bengal Regulation XXIX of 1814, is not to be construed in its restricted meaning, but includes the widow of a deceased *ghatwal*, who may therefore be one of his heirs. *Lall Dharee Roy* v. *Broja Lall Singh* (1), and *Kustooree Koomaree* v. *Monohur Deo* (2) referred to.

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* Appeal from Original Decree No. 132 of 1893, against the decree of W. H. Smith, Esq., Sub-divisional Officer and Subordinate Judge of Deoghur in Zillah Sonthal Pergunahs, dated the 15th of February 1893.

(1) 10 W. R. 401. (2) W. R. Gap. No. (1864) 39.

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Where a *ghatwali* tenure was admittedly impartible and governed by Mitakshara law, and the only heirs were the widow and the brother of the late *ghatwal*, *Held*, (it being found on the evidence that the brothers had separated and that the *ghatwali* tenure was the exclusive property of the late *ghatwal*), that his widow was his heiress according to Mitakshara law.

Although, according to the decision of the Privy Council in *Chintaman Singh* v. *Nowlukho Koonwari* (1), impartible property is not necessarily separate property, yet, *Semble* that with reference to the peculiar character of *ghatwali* tenures as described in Reg. XXIX of 1814, they were intended to be the exclusive property of the *ghatwal* for the time being, and not joint family property in the proper sense of the term.

[R., 5 Ind. Cas. 193 (195).]

[157] THIS was a suit to recover possession of a *ghatwali* estate in Beerbhoom.

The plaintiff was the widow of the late *ghatwal* Ananta Narain Singh, who died on 14th Agrahan 1295 (2nd November 1888), and she claimed to succeed to the estate in preference to the defendant Chhatradhari Singh, the brother of her late husband, who was appointed by the Deputy Commissioner of the Sonthal Pergunnahs to be *ghatwal* on 7th June 1889, in supersession of the plaintiff's claim. This defendant, she alleged, had separated from the family before the death of Darbar Singh, his and her husband's father, and had remained separate ever since. The plaintiff claimed to be heiress of her husband and *ghatwal* of the estate under the law and custom which prevails in *tuppeh* Sewruth Deoghur, which was that the eldest son becomes *ghatwal*, and if there is no male issue then the widow is entitled to succeed.

The Secretary of State for India in the person of the Deputy Comissioner, was made a party defendant to the suit.

The defendant Chhatradhari Singh alleged that he was joint with his brother, the late Ananta Narain Singh up to the time of his death, and that there had been no separation between them; that according to the Benares school of law by which the family was governed, he was entitled to succeed to the *ghatwali* in preference to the plaintiff; and he submitted that the plaintiff was not the heiress to the estate either according to Reg. XXIX of 1814 or Act V of 1859.

The Secretary of State submitted that the plaintiff being a widow of the deceased *ghatwal* was not his "descendant" within the meaning of s. 2 of Reg. XXIX of 1814, and was therefore not entitled to succeed to the *ghatwali* estate; and that the succession to the *ghatwali* was not regulated by any system of Hindu law, or by *kulachar* (custom), and therefore the plaintiff, as she had not been appointed *ghatwal* by the executive authorities, could not recover possession of the estate, the suit not being maintainable.

The material issues raised were:—

(1). Was the Deputy Commissioner justified by law in appointing the defendant Chhatradhari Singh as *ghatwal* in preference [158] to the plaintiff, or is there any valid local custom under which he was bound to appoint the plaintiff in preference to the defendant?

(2). Was the defendant Chhatradhari Singh separate in estate and transaction, from his brother the late Ananta Narain Singh, and, if so, could he succeed his brother?

(1) 1 C. 153=24 W.R. 255.

(3). Is there in *tuppeh* Sewruth Deoghur, the custom of appointing females as *ghatwals*, and, if so, can the plaintiff claim as of right to be made *ghatwal* ?

The Subordinate Judge on these issues found that the defendant was separate in food and transactions from his brother, and therefore not entitled to succeed him; that there was a custom in Sewruth Deoghur of females succeeding to *ghatwali* estates; and, referring to the case of *Kustooree Koomaree* v. *Monohur Deo* (1), held that there was nothing in this respect to bar the plaintiff from succeeding as *ghatwal*; that the Deputy Commissioner had no power to appoint any one as *ghatwal* without reference to whether he had the best claim as a natural heir, referring to *Lall Dharee Roy* v. *Brojo Lall Singh*(2); and that the plaintiff was, within the meaning of s. 2 of Reg. XXIX of 1814, a "descendant" of her husband, and therefore entitled to succeed him as *ghatwal*.

The defendant Chhatradhari Singh appealed to the High Court. The grounds of appeal and the arguments are sufficiently stated in the judgment of the Court.

Babu *Mohini Mohun Roy* and Babu *Akhoy Coomar Banerjee*, for the appellant.

The Senior Government Pleader, Babu *Hem Chunder Banerjee*, and Babu *Karuna Sindhu Mookerjee*, for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

One Ananta Narain Singh was the holder and possessor of an ancestral *ghatwali* tenure in the Sonthal Pergunnahs described in the plaint as "Mehal No. 38 *ghatwali* taluk Noniad within *towji* No. 1, within pergunnah Shaontadi *tuppeh* Sewruth in Deoghur." He died without issue on the 14th Agrahan 1295, leaving a widow, **[159]** Srimati Saraswati Kumari, who is the plaintiff in this suit, and who claims to be entitled as her husband's heiress to succeed to the *ghatwali* in preference to her husband's brother, Chhatradhari Singh. Her case as set out in the plaint is substantially this: According to long-established custom the *ghatwali* is held by one person and descends to his eldest son, and in default of male issue to his widow; that after her husband's death she applied to have her name recorded as her husband's successor to the *ghatwali*, but that the Deputy Commissioner rejected her application and illegally appointed her late husband's brother, the defendant Chhatradhari Singh, to be *ghatwal*; that the defendant is not her husband's heir, that he separated from her husband during the life-time of his father, the late Darbar Singh, and has ever since remained separate in food and transactions; and that according to the custom prevailing in *ghatwali* tenures, he was allotted certain *mouzahs* for his maintenance. She accordingly brought this suit to establish her right to the *ghatwali* tenure as heiress of her husband, and to set aside as illegal the order appointing her husband's brother as his successor to the *ghatwali*. The defence raised by Chattradhari Singh was that he was not separate from but joint with his brother, and that under the Benares School of Hindu Law he was his brother's successor and not the plaintiff; and the defence of the Secretary of State, who was subsequently added as a defendant, was that the plaintiff is not a descendant of the deceased *ghatwal*, within the meaning of s. 2 Reg. XXIX of 1814, and is therefore not entitled to succeed to the *ghatwali* in question.

(1) W.R. Gap No. (1864) 39. (2) 10 W. R. 401.

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The learned Subordinate Judge has decreed the suit. He finds that the Deputy Commissioner was not legally competent to appoint Chhatradhari to succeed his deceased brother as *ghatwal*; that the word "descendants" in s. 2 of Reg. XXIX of 1814 is not necessarily restricted to actual issue of the body but includes natural or legal heirs; that Chhatradhari Singh was separate from his brother in estate and transactions at the time of his brother's death; that, therefore the plaintiff, and not Chhatradhari, was the legal heir of Ananta Narain, and that there was no bar to the plaintiff's right by reason of her being a female, it being established that there is a custom prevailing in *tuppeh* Sewruth Deoghur of females succeeding to *ghatwali* tenures.

[160] Against this decree, the defendant Chhatradhari appealed to this Court. He has since died, and his eldest son has been substituted as his legal representative for the purpose of the present appeal. His learned pleader has attacked the judgment of the lower Court mainly on two grounds, *viz.*, (1) that plaintiff being the widow of the late *ghatwal* is not "a descendant" within the true meaning of the term, as used in s. 2 of Reg. XXIX of 1814; and (2) that Chhatradhari was joint with his brother at the time of his death, that the *ghatwali* tenure was joint family property, and therefore that Chhatradhari was entitled to succeed under the law of the Mitakshara.

As regards the first ground, we are not prepared to give the word *descendants* the restricted meaning contended for by the learned pleader for the appellant. No doubt in its strict grammatical sense, the word denotes issue of the body, but having regard to the origin, character and incidents of these Beerbhoom *ghatwali* tenures as described in Reg. XXIX of 1814 (the tenure in the present case is admittedly a Beerbhoom *ghatwali*) it seems to us very doubtful whether the framers of the Regulation intended to give to it that restricted meaning. Mr. Justice Jackson in the case of *Lall Dharee Roy* v. *Broj Lall Singh* (1) observes in reference to Reg. XXIX of 1814: "By this enactment a hereditary tenure was secured to the *ghatwals* and their descendants, subject only to the condition of punctual payment of the rent assessed upon them and fulfilment of their other obligations." We entirely concur in the remarks of that learned Judge. We think that these tenures are in fact tenures to be held in perpetuity, and are descendible from generation to generation subject to certain conditions and obligations, and that it would be inconsistent with the true character of these tenures to hold that the Legislature intended that they should devolve on issue of the body only and not on heirs generally according to the law which may govern such succession. Moreever, the case of *Kustooree Komaree* v. *Monahur Deo* (2), appears to us a clear authority in favour of the view we take. In that case the learned Judges held that under the Mitakshara the mother of the last *ghatwali*, in default of **[161]** issue of the body, had a preferential right to the *ghatwali* tenure as against a collateral male member of the family. It is true that the meaning of the word "descendants" in Reg. XXIX of 1814 does not appear to have been discussed in that case, the principal point for determination being whether a female could hold a *ghatwali* tenure, but at the same time we do not think it likely that the learned Judges in arriving at the conclusion they did arrive at, entirely overlooked this matter. In describing the nature of these tenures they observed as follows: "These tenures, it must

(1) 10 W. R. 401.

(2) W. R. Gap. No. (1864) 39.

be remembered, were in existence in many parts of the country long before the accession of the present Government, and were grants of land made either by the authority or sanction of the Government to certain persons as remuneration for their services as police. The head or *sirdar* of each of these police stations was required to keep up a certain number of men properly armed to apprehend criminals, protect travellers, keep the peace and to perform other police duties. They were liable to be dismissed for misconduct or neglect, and any stranger might have been appointed in their room. Some of these grants were hereditary in their origin, and all very soon became so, and it being inconvenient and wholly subversive of the *ghatwali* system to admit the element of Hindu law, which requires an equal division of the deceased father's property among his sons, the *ghatwali* tenure descended undivided to the eldest son, to the exclusion of the others, who either lived with, or were supported by him, or followed their own pursuits."

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We think that these observations indicate that the learned Judges then understood that the word "descendants" in the Regulation was not meant to be confined to the heirs of the body but that it included heirs generally according to the particular law applicable to the case.

The plaintiff then being, as we think, a descendant of her husband within the meaning of the Regulation, the next question which arises is whether she or her husband's brother is the preferential heir of Ananta Narain Singh. It is admitted that by custom the *ghatwali* tenure is impartible and descends to the eldest son, and further that this family is governed by the law of Mitakshara. **[162]** In the case of *Nilkristo Deb Barmono* v. *Bir Chundra Thakur* (1). [see also *Surtaj Kuari* v. *Deoraj Kuari* (2)] their Lordships of the Privy Council at page 542 of the report in Moore's I. A. observed: "Where a custom is proved to exist, it supersedes the general law which however still regulates all beyond the custom." Applying this principle to the present case, the point for determination is whether Chhatradhari, at the time of the death of his brother Ananta Narain, was joint with or separate from him. We have examined the evidence bearing on this matter, and we have no hesitation in accepting the conclusion of the learned Subordinate Judge that Chhatradhari was separate from his brother in food, estate, and transactions. We think the evidence proves that Chhatradhari separated in 1262 during the life time of his father Darbar Singh, who then assigned to him for his maintenance five villages appertaining to the *ghatwali* holding—an assignment which after his father's death was renewed by Ananta Narain in 1292. The evidence further proves that Chhatradhari exclusively enjoyed the profits of these five villages; that he held some other villages on lease from his father, two of which he dealt with as his own property by sale to Muktaram Dutt and Dorab Khan, and also that his transacations generally were separate from those of his brother. We find also on the evidence that the *ghatwali* was exclusively the property of Ananta Narain, who was in sole enjoyment of the profits thereof with the exception of the villages assigned to Chhatradhari according to the prevailing custom. In this view the plaintiff, being the widow of Ananta Ram, is clearly his heiress under the Mitakshara, and neither Chhatradhari nor any of his sons has any right to succeed by survivorship.

The learned pleader for the appellant has however contended before us that, although this *ghatwali* tenure is impartible, yet, according to the

(1) 12 M. I. A. 523=3 B. L. R. P. C. 13. (2) 10. A. 272=15 I. A. 51.

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decision of their Lordships of the Privy Council in *Chintaman Singh* v. *Nowlukho Koonwari* (1), it is not necessarily separate property, and that as their Lordships observe "whether the general status of a Hindu family be joint or undivided, property **[163]** which is joint will follow one and property which is separate will follow another course of succession." The decision referred to is no doubt an authority for the proposition that there may be impartible joint family property, such as a raj or other estate similar to a raj, but whether such property is to be regarded as joint or separate would appear to depend generally upon the character of the property at its inception, such as the nature of the grant, &c., creating it. Having regard however to the view we have already expressed as to the status of the family in the present case, and as to the *ghatwali* tenure having been the exclusive property of Ananta Narain, we think it is unnecessary to determine what was originally the character of this tenure, although, if we were called upon to decide the question, we should be disposed to say, with reference to the peculiar character of these tenures as described in Reg. XXIX of 1814, that they were intended to be the exclusive property of the *ghatwal* for the time being, and not joint family property in the proper sense of the term. And in this connection we would refer to some observations of the learned Judges who decided the case of *Kustooree Koomaree* v. *Monohur Deo* (2) already referred to. They say: "The party who succeeds to and holds the tenure as *ghatwal* must be, and has always been, looked upon as sole proprietor thereof, and therefore, the other members of the family cannot claim to be co-parceners and entitled to share in the profits of the property, though they may by the permission and good will of the incumbent derive their support, either from some portion of the property which he may have assigned to them or directly from himself, and if it be so with the nearer members, the distant members of the same family cannot be considered as holding in common with the incumbent so as to bar the widow or mother's right to succeed."

For the above reasons we think the learned Subordinate Judge has rightly decreed this suit, and we accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

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22 C. 164.

[164] APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Sale.

THE DEPUTY LEGAL REMEMBRANCER ON BEHALF OF THE GOVERNMENT OF BENGAL (*Appellant*) *v.* KARUNA BAISTOBI AND ANOTHER (*Respondents*).* [19th October, 1894.]

Penal Code, ss. 372, 373—*Buying minor for purpose of prostitution—Intention, Proof of*—Onus *of proving guilty intention in case of sale of minor for purpose of prostitution—Confession after retraction, Value of—Confession made by person charged jointly with another for separate offences arising out of one transaction, Admissibility of as against the other—Evidence Act* (*1 of* 1872), ss. 30, 106.

In order to constitute an offence under s. 373 of the Penal Code, it is not necessary that the intention or knowledge of likelihood as to the employment of the minor for purposes of prostitution should be with reference to employment

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*Criminal Appeal No. 2 of 1894 and Criminal Revision No. 577 of 1894 against the order of acquittal passed by G. Gordon, Esq., Officiating Sessions Judge of Bankura, dated the 11th of August 1894.

(1) 1 C. 153=24 W.R. 255. (2) W. R. Gap. No. (1864) 39.

either immediate or at some definite, and not very remote, future period, but an offence under the section is complete as soon as a girl is purchased with the guilty intention or knowledge of likelihood that she shall, while still a minor under the age of 16 years, be employed for that purpose, although the point of time for such employment may be remote by reason of her physical incapacity for the purpose.

H. the father of two girls, twins about a year old, sold one of them to *K*, a prostitute, for Rs. 9, and within ten days of such sale also sold her the other for Rs. 14. *K* was shown to have previously purchased another child whom she had brought up from her infancy, and who was then living with her and leading the life of a prostitute. Both *H* and *K* made confessions as to the guilty knowledge and intention with which the sale of the two children was made. *K's* confession was made within two hours after her arrest, and immediately thereafter she was committed to *hajat* for seven days. On the seventh day, on being brought up for trial before the Deputy Magistrate she retracted her confession and assigned an innocent reason for her purchase of the girls. *H* and *K* were tried jointly, *H* being charged with an offence under s. 372, *viz.*, selling the girls for the purpose of prostitution, and *K* with an offence under s. 373, *viz.*, buying for the same purpose. Neither was charged with abetting the other. The two confessions were used as evidence, and there was other evidence tending to prove the intention and guilty knowledge. The Deputy Magistrate convicted each of the offence with which they were charged. On appeal the Sessions [165] Judge acquitted *K* on the ground that the offence under s. 373 could not be committed unless the intention was that the minor was to be used for the purpose of prostitution at some definite future time, and that it would be carrying the law too far to hold that the intention had reference to a period some 12 or 14 years after the purchase when the minor became capable of being used for that purpose.

Held, for the reasons above stated, that the acquittal on that ground was erroneous.

Held, further, that having regard to the circumstances under which the confession of *K* was given and retracted, it was open to suspicion, and could not safely be acted upon, and that the confession made by *H* was not legally admissible against her as they were not being tried jointly for the same offence.

Held, also, that having regard to the provisions of s. 106, ill. (*a*) of the Evidence Act, and to the fact that there was evidence, apart from the confession which tended to show the knowledge and intention which the character and circumstances of the aet suggested, the *onus* lay on *K* to show that the intention was other than that which the act suggested or that the employment of the girls as prostitutes was not intended till after they had attained the age of 16 years, and that as she had failed to show this, and the evidence all tended the other way, the acquittal was erroneous and must be reversed.

[Appr., 18 A. 24 (27) = 15 A.W.N. 141; R., 23 A. 124 (126) = 21 A.W.N. 16; 19 M. 127 (135); 14 Cr. L. J. 33 (39) = 18 Ind. Cas. 257 = 24 M.L. J. 211 = 13 M L.T. 131 = (1913) M.W.N. 207 (215); 16 C.P.L.R. 171 (176); 17 C.P.L.R. 75 (78); 12 P.R. 1904 (Cr.) = 110 P.L.R. 1904.]

In this case accused No. 1 Karuna Baistobi was charged with an offence under s. 373 of the Penal Code with regard to two infants of the age of about one year, who were alleged to have been sold to her by their father, accused No. 2, Haradhan Mandal, and he was charged with an offence under s. 372.

The case for the prosecution was that Karuna Baistobi, who was a prostitute in the town of Bankura, purchased from Haradhan Mandal—(1) on the 15th of Jaistha, a girl named Bhusan about one year old; and (2), on the 24th Jaistha, another girl named Shoshi, about one year old, with the intent that the girls should be employed or used for the purpose of prostitution.

Haradhan Mandal was accused of selling them to Karuna Baistobi, knowing it to be likely that the girls would be used for the purpose of prostitution.

Karuna Baistobi admitted having purchased, and Haradhan Mandal admitted having sold, the girls Shoshi and Bhusan.

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Evidence was given to the effect that there was at the time [166] of the sale, in the house of Karuna Baistobi, a girl named Amadini, said by Karuna to be about 15 or 16 years of age, who had been (according to the statement of Karuna herself) carrying on prostitution for the last two or three years.

As to the intention with which Karuna purchased the girls Shoshi and Bhusan, the accused before the trial confessed that she had purchased them with the object that they should become prostitutes; but at her trial she retracted her confession and stated that her intention was to marry them.

Apart from the confessions of Karuna and Haradhan there was sufficient evidence to show that there was a sale and purchase of the girls Shoshi and Bhusan.

It was also in evidence that prostitutes seldom marry the girls they beget or purchase. One witness only stated that he remembered two cases in which two prostitutes living in Bankura married the girls they had purchased; but he also said that the girls were never, after marriage, sent to live with their husbands; the ceremony of marriage being apparently gone through as a matter of mere form with no ulterior intention.

Amadini who was called as a witness stated that Karuna had bequeathed to her all her property. The circumstances under which the confession was made and retracted by Karuna sufficiently appear in the judgment of the High Court.

Upon these facts the Deputy Magistrate convicted both the accused giving the following reasons :—

"Selling minor girls to prostitutes and causing them to carry on prostitution does not seem to be regarded by the people of this town at least as an offence. The pleader for the defence argues that this is the first case of this nature in this district.

"I think the offence with which the accused are charged has been sufficiently proved. That Amadini became, while living at Karuna's house, and while still a minor, a prostitute, appears from the statements of Karuna and Amadini themselves. Karuna had brought Amadini up in her house, and was her guardian, and if Amadini became a prostitute while still a minor, Karuna was certainly to blame for it.

"Accused Haradhan Mandal cited no witnesses in defence, nor did he retract his confession. Karuna's witnesses prove nothing. I therefore find Karuna guilty under s. 373, Penal Code, and Haradhan guilty [167] under s. 372, Penal Code, and sentence them each under those sections to undergo rigorous imprisonment for nine months."

Against the convictions both the accused appealed to the Sessions Judge, who upheld the conviction in the case of Haradhan Mandal, but reversed that in the case of Karuna Baistobi.

His judgment in the latter case was as follows :—

It appears to me in this case that the appellant is entitled to be acquitted. The intention that the girls, who were less than a year old, should be employed or used as prostitutes cannot be said to have been sufficiently proved. Intention must be used with reference to some definite future time or contingency, and here it would be, I think, carrying the law too far to make it mean that the intention has reference to the time when some 12 or 14 years later the girls may come to be of such an age as to be able to be employed or used as prostitutes. It is not indeed distinctly stated that the intention must be that the girl is to be immediately so

employed, but I think that this is the only method of construing the section. What may happen to the appellant or the girls that she has received under her care during the next 12 or 14 years cannot be foreseen, and even were it now to be argued that the intent was sufficiently proved by the appellant's own confession, I do not think that the intent can be held to be possibly existing within the meaning of the law.

"The finding and sentence with regard to the appellant Karuna are set aside and she is released from jail."

The following were the reasons given by the Sessions Judge for upholding the conviction in the case of the male accused :—

"The disposal of the children is an admitted fact, and setting aside the question of intention which can obviously not apply to this case, as the appellant could have no possible object in desiring that his daughters should be brought up to a life of prostitution, it remains to be seen whether the necessary knowledge has been sufficiently proved. This fact of knowledge can only be proved by indirect and circumstantial evidence."

"With regard to this there is, on the one side, evidence that the disposal of the children was complete, and that their guardianship and protection was definitely and finally transferred to the prostitute. The presumption would therefore arise that they would be brought up as prostitutes, and it is also shown that other girls have been brought up in the same way which was a fact of which the appellant must have been aware. The burden of proving that he did not know that the children would be employed as prostitutes will, therefore, clearly be upon the appellant, and unless he can rebut the presumption of guilty knowledge he cannot claim to be acquitted of the charge."

"It will be seen that the intention of the appellant is essentially distinct from that of the prostitute, for in his case immediately the transaction is [168] completed the commission of the offence is also a completed fact, for by divesting himself of his authority he has placed it out of his power to, in any way, divert the natural course of events that will lead the girls to prostitution. With the prostitute the case is different, for she may at any time change her intentions before their prostitution becomes an actual fact, and the ultimate object is too remote in her case for consideration."

"For the above reasons I think that I should not interfere with this conviction."

The Local Government thereupon appealed against the acquittal of Karuna Baistobi and at the same time applied for and obtained a rule calling on the male accused to show cause why the sentence passed on him should not be enhanced.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*), for the Crown.

Babu *Baidya Nath Dutt* and Babu *Sarat Chandra Dutta*, for the accused Karuna Baistobi.

No one appeared on behalf of the male accused to show cause against the rule.

The judgment of the High Court (BANERJEE and SALE, JJ.) was as follows :—

JUDGMENT.

This is an appeal by the Local Government under s. 417 of the Code of Criminal Procedure against an order of the Sessions Judge of Bankura acquitting on appeal the accused Karuna Baistobi, who had been convicted by the Deputy Magistrate of that district under s. 373, Indian Penal Code, for buying two minor girls for the purpose of prostitution. The undisputed

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facts of the case are that the accused Karuna Baistobi purchased the two girls from their father on two dates separated by a short interval, the first one for Rs. 9 and the second for Rs. 14; that the girls are twins about one year old; and that their father sold them, their mother being dead, and he having found some difficulty in bringing them up. The question that really arises for determination in this case is whether the girls were bought with the guilty intention or knowledge which is requisite under s. 373 to constitute the offence made punishable by that section. The evidence adduced in proof of such guilty knowledge or intention consists of the confession of the accused, and of the deposition of certain witnesses who say that the accused is herself a prostitute, that she has brought up another girl from her [169] infancy, a girl named Amadini, who is now living with her in her house and is leading the life of a prostitute, that it is the practice with prostitutes in that part of the country to buy girls for the purposes of prostitution, though sometimes such girls are married, and that even where they are married, it is rarely that they come to live with their husbands. There is also some evidence tending to show that the girl Amadini is leading the life of a prostitute of her own accord, and was never induced by the accused to do so, and, further, that the accused purchased the two girls in question with a view to bring them up, so that they might take care of her in her old age. Upon all this evidence the Deputy Magistrate, who tried the accused jointly with the father of the girls, Haradhan Mandal, on charges under ss. 372 and 373, Indian Penal Code, held that the guilty intention required by ss. 372, 373 had been made out, and he accordingly convicted both the accused Karuna Baistobi and Haradhan, the father of the girls, the former under s. 373 and the latter under s. 372, Indian Penal Code, and sentenced each to rigorous imprisonment for nine months. They preferred separate appeals to the Sessions Judge, and the learned Sessions Judge dismissed the appeal of Haradhan Mandal but, on the appeal of Karuna Baistobi, reversed the finding and sentence and acquitted her. The ground upon which the judgment of the learned Sessions Judge in the case of Karuna Baistobi is based is not that upon the facts no guilty intention or knowledge that the girls would be employed for purposes of prostitution had been made out, but that, as a matter of law, no offence under s. 373 can be said to have been committed if the guilty intention or knowledge as to the employment of the girls purchased is not as to their present employment for the purpose of prostitution; and, as in the present case, considering the age of the girls, their present employment for purposes of prostitution was physically impossible, the learned Judge is of opinion that no offence under s. 373 has been committed. Against this judgment of acquittal the Local Government has preferred this appeal, and the Public Prosecutor has also obtained a rule, which we shall dispose of presently, calling upon the other accused, Haradhan Mandal, to show cause why the sentence passed upon him should not be enhanced.

[170] We have given to this case all the anxious consideration that criminal cases, involving, as they do, interference with the liberty of the subject, generally, and appeals against orders of acquittal specially, demand. The law by limiting the right of appeal against judgments of acquittal to the Local Government, prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and evidently intends that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter. We think it is a most salutary principle, quite as

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necessary for the well being of society as the repression and punishment of crime, that interference with judgments of acquittal should take place only in cases where there has been a miscarriage of justice of a grave nature; and if in this case the learned Judge had found on the evidence that he could not safely rely upon the confession of the accused, and that the other evidence was not sufficient to warrant the conclusion that there existed guilty knowledge or intention on her part, we should have felt the greatest possible hesitation in interfering with his judgment. But as it is, that is not the ground of the acquittal in this case. The ground of the acquittal as I have stated above is that, as a matter of law, no offence under s. 373 can be said to have been committed unless the intention or knowledge of likelihood that the minor girl purchased shall be employed for purposes of prostitution is an intention or knowledge of likelihood that such employment is to be immediate. This is what the learned Judge says: "It appears to me in this case that the appellant is entitled to be acquitted. The intention that the girls, who were less than a year old, should be employed or used as prostitutes cannot be said to have been sufficiently proved. Intention must be used with reference to some definite future time or contingency, and here it would be, I think, carrying the law too far to make it mean that the intention has reference to the time when some twelve or fourteen years later the girls may come to be of such an age as to be able to be employed or used as prostitutes. It is not indeed distinctly stated that the intention must be that the girl is to be immediately so employed, but I think that this is the only method of construing the section." Now, if the learned Judge's view of the **[171]** law were accepted, it would lead to great miscarriage of justice; for, in that case, the protection from vice, so far as the Criminal Law affords it to the infant, would be denied in the case of those for whom it is most needed and evidently intended. Though in the case of a girl purchased for the purpose of prostitution who has attained physical maturity sufficient for the purposes of vice, the evil day is near at hand, and so far her fate is to be pitied more than that of one in whose case the evil day is more distant, yet with the physical maturity attained, there is a certain amount of mental capacity acquired which would enable her to resist vice if she is so minded. But in the case of infants of tender years, like the two little children in this case, considering the surroundings under which they would be brought up, it would be practically impossible for them to exercise any moral judgment when the time comes for them to choose their course of life. It would, therefore, in our opinion be a most unreasonable construction to put upon s. 373, to say that an offence under that section is not complete unless the intention or knowledge of likelihood as to employment for the purpose of prostitution is with reference to employment either immediate or at some definite and not very remote future period. We think that an offence under that section would be complete as soon as a girl is purchased with the guilty intention or knowledge of likelihood that she shall be employed for the purpose of prostitution, although the point of time for such employment may be remote by reason of her physical incapacity for the purpose. The main question in the case then, as we have stated above, is whether the purchase of the two minor girls was with the intention that they should be employed for the purpose of prostitution or with the knowledge of likelihood that they should be so employed. Upon that question, which is really a question of fact, the judgment of the learned Sessions Judge does not afford us any assistance. We here feel it our duty to add that we have derived most material assistance

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in this case from the exhaustive, yet concise, and the cogent, yet temperate, arguments advanced by the learned Deputy Legal Remembrancer and by Baboo Baidya Nath Dutt, who respectively represented the Crown and the accused.

Before proceeding to discuss the evidence, we think it proper [172] to observe that, in order to constitute an offence under s. 373, Indian Penal Code, there must be the buying of a minor girl under the age of 16 years with intent that such minor shall be employed for the purpose of prostitution or with the knowledge of likelihood that she shall be so employed, while yet a minor under the age of 16. The offence will not be constituted if, notwithstanding the existence of such intention or guilty knowledge, the employment that is intended or known to be likely is to take place after the completion of the sixteenth year by the minor. This is clear from the language of the section; and if any authority were needed in support of this view, we might refer to the observation of Muttusami Iyer, J., in the case of the *Queen-Empress* v. *Rammanna* (1). That then being the kind of intention or knowledge which must be shown to exist before an offence under s. 373 can be said to have been committed, let us now see how far such intention or knowledge is proved to have existed in this case by the evidence adduced. The confession of the accused no doubt affords the most direct evidence of the existence of such an intention; but considering the circumstances under which the confession was made and subsequently retracted, we do not think it would be safe to find the existence of guilty knowledge or intention solely upon the basis of that. The confession was made on the 16th of July in the evening between the hours of 6 and 8 P. M., the arrest having been made at 6, and the order directing her to be taken to *hajat* being made at 8. The order for taking the accused to *hajat* directs her detention there for seven days, and she appeared again before the Deputy Magistrate to take her trial on the 23rd July. On that very day she retracted her confession. A confession so made and retracted must always be open to suspicion: and I would repeat what I had occasion to observe more than once that I feel considerable force in what Cave, J., says in the case of *The Queen* v. *Thompson* (2) where he remarks: "I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial."

It was argued by the learned Deputy Legal Remembrancer [173] that, conceding that there was any ground for suspicion regarding the genuineness and voluntary nature of the confession of the accused Karuna Baistobi, there was the confession of the other accused, Haradhan Mandal, who was tried jointly with her, and which was never retracted, which might be used as evidence under s. 30 of the Indian Evidence Act; and it would go to show that the intention was such as s. 373 requires. We are of opinion that that confession is not legally admissible in evidence against Karuna Baistobi. Section 30 provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession, and the explanation appended to that section by Act III of 1891 says: "Offence as used in this section includes the abetment of, or attempt to commit, the

(1) 12 M. 273. (2) L.R. (1893) 2 Q.B. 12.

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offence." Upon this it is argued that as the offence for which Haradhan Mandal was tried, *viz.*, the selling of the minors whom Karuna Baistobi bought, was in reality an abetment of Karuna Baistobi's offence, the confession of Haradhan was legally admissible as evidence against her. We do not consider this contention sound. Perhaps Haradhan might have been tried for the abetment of the offence with which Karuna was charged; but, as a matter of fact, he was not so tried. He was tried for a substantive offence under the Indian Penal Code, *viz.*, an offence made punishable under s. 372, and we do not think it would be right to extend the explanation in the way we have been asked to do.

But though the confession of Karuna Baistobi may not be safe to be relied upon, if it had stood alone, and though the confession of the other accused is not admissible in evidence against her, we think there is plenty of other evidence to show that the purchase of the two girls by Karuna Baistobi was with intent that they should be employed for the purpose of prostitution. We quite agree with the learned vakil for the accused that it is for the prosecution to show the existence of such intention, and that the existence of such intention must be proved by strong evidence. But the evidence to prove the existence of an intention [174] need not be limited to statements by the accused herself, admitting the existence of such an intention in her own mind, or to the evidence of some person who can come forward and swear that he heard the accused say that that was his or her intention. The existence of an intention, like any other fact, may be proved by evidence of conduct and circumstances, and here we think there is ample evidence afforded by the conduct of the accused, and the circumstances of the case, to show that her intention in buying these girls was that they should be employed for the purpose of prostitution. No doubt there is some evidence to show that prostitutes in this part of the country do sometimes bring up girls for the purpose of having them married, but the weight of evidence is altogether the other way, *viz.*, that, as a rule, they buy girls for the purpose of making them live the life of a prostitute. If a prostitute advanced in life were to adopt a girl, it might be that, moved by remorse, she might do so with the object of having some one to take care of her in her old age, who was leading an honest life and was not like one of her ordinary fallen sisters. Possibly there might have been room for such a contention if the purchase in this case had been confined to one girl only. As it is, we find that within a week of one another two purchases were made by the accused, one for Rs. 9 and the other for Rs. 14; and it is incredible that she intended to bring up both these girls for the purpose of disposing of them in marriage, and having as her adopted daughters two young women leading honest lives. We are quite free to own that, apart from the evidence the presumption must always be in favour of innocence. But here the circumstances all tend the other way. Then, again, we have it clearly in evidence that the accused is not altogether a stranger to this line of conduct, *viz.*, of buying girls to be employed for the purpose of prostitution. It is proved that she did buy another girl, then an infant, whom she brought up and to whom she has bequeathed all her property, who is still living with her and is leading the life of a prostitute. Illustration (*a*) to s. 106 of the Evidence Act, to which the learned Deputy Legal Remembrancer called our attention, has an important bearing upon the question we are now considering. That illustration is to this effect: "When a person does an act with some intention other [175] than that which the character and circumstances of the act suggest the

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burden of proving that intention is upon him." If, notwitstanding the act of purchase of these two girls successively, the intention was something other than that which would evidently be suggested by the character and circumstances of the act, it was for the accused to have shown that, but no such thing has been shown on the part of the accused. A further argument was raised that, although all this may go to show that the intention was that the girls should be employed for the purpose of prostitution, still they did not sufficiently show that the employment intended was to be before the completion of the sixteenth year by the girls. Here, again, the provisions of the Evidence Act referred to above would show that it was for the accused to prove that she intended to put off the employment until the completion of the sixteenth year. The age of maturity for the purpose of prostitution is attained before the completion of the sixteenth year, and there is nothing shown why it should be held that, though the intention was that the girls should be employed for the purpose of prostitution, the intention was nevertheless qualified to the extent that the employment was not to take place until the sixteenth year was completed. We must view the matter as one of ordinary common sense; and we think it would be refining too much to say that the intention, though it existed generally, was yet qualified to this extent that the employment intended was to be deferred till some considerable period after the attainment of physical capacity for the purpose. The result then is that the judgment of acquittal must be reversed and the accused convicted of the offence punishable under s. 373, Penal Code.

The next question is the question of sentence. We were asked to treat the offence lightly, considering that it has been committed by a prostitute of low class. No doubt if the offence had been committed by another person with better education or better surroundings its enormity would have been greater; but the mere fact of its having been committed by a low class prostitute would not be sufficient to induce us to treat the offence lightly and to visit it with a nominal punishment. Considering all the circumstances of the case, we think the punishment that was inflicted on the accused by the Deputy Magistrate who convicted her would **[176]** be sufficient to meet the ends of justice; and we accordingly sentence her to nine months' rigorous imprisonment.

In the rule that was obtained against Haradhan Mandal, no one has appeared to show cause. His offence is of a more aggravated nature. He was the natural guardian of these infants. It was his duty to protect them, not only against physical evils, but also, so far as it was in his power, against moral evils. Instead of doing anything of the kind he sold them for the purpose of prostitution as he himself admits, for money, and on the second occasion there was a regular haggling for the price. All this, in our opinion, greatly aggravates his offence; and though we are, as a rule, extremely disinclined to enhance sentences, in the present case, we think the ends of justice require that we should exercise this exceptional power. We accordingly enhance the sentence in this case to rigorous imprisonment for eighteen months.

Appeal allowed and rule made absolute.

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CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

RAJ CHUNDER MOZUMDAR (*Petitioner*) v. GOUR CHUNDER MOZUMDAR (*Opposite Party*).* [5th September, 1894.]

Sanction to prosecute—Prosecution commenced more than six months after granting of sanction, the period intervening being close holidays—Penal Code, ss. 193, 471—*Criminal Procedure Code* (1882), *ss.* 195 *and* 537.

Sanction to prosecute *R* for offences under ss. 193 and 471 of the Penal Code committed in the course of a judicial proceeding was granted on the 5th September 1893, and the prosecution was commenced before the Magistrate on the 7th March 1894, the 4th March being a Sunday, and the 5th and 6th Court holidays. *R* was committed to the Sessions.

Held, that as s. 7 of Act I of 1887 does not apply to the Code of Criminal Procedure of 1882, and there is no provision of law by which the period provided by s. 195 during which a sanction may remain in force can be extended by reason of the period expiring during Court holidays, **[177]** the proceedings of the Magistrate were without jurisdiction, and the commitment must be quashed.

Held, further, that s. 537 of the Code of Criminal Procedure was not intended to override the provisions of s. 195, nor can it be said that there has not been a failure of justice in the prosecution of a person after the period for which the sanction was in force has expired.

[**Overruled**, 27 C. 839 (845) (**F.B.**) ; **Diss.**, 29 M. 149 (150) ; 17 M.L.J. 533 (534) ; **R.**, 23 C. 983 (990) ; 21 A.W.N. 151 ; 9 C.W. 909 (910) ; Rat. Unrep. Cr. Cas. 803 ; **D.**, 2 Weir 200.]

THE petitioner in this case was charged with offences under ss. 195 and 471 of the Penal Code, the alleged false evidence having been given, and the forged documents used in two suits brought by him against the complainant and tried in the Court of the second Munsif of Lakhipur. Sanction to prosecute the petitioner was granted in respect of these offences on the 5th September 1893, and the petition to prosecute him was presented to the Magistrate on the 7th March 1894. It appeared that the 4th March 1894 was a Sunday and the 5th and 6th March were Civil Court holidays, and that the Criminal Courts were also closed on those dates. At the commencement of the criminal proceedings objection was taken on behalf of the petitioner that under the provisions of s. 195 of the Code of Criminal Procedure the sanction to prosecute was no longer in force, as the limit of six months provided by that section during which it remained in force had expired before the commencement of the prosecution.

The Deputy Magistrate, however, overruled this objection, holding that, although the prosecution was commenced three days after the expiry of the six months, it was in time, as the last three days were close holidays. He accordingly enquired into the case and committed the petitioner for trial on charges under ss. 193 and 471 by the Court of Session.

The petitioner then applied to the High Court, and a rule was issued calling on the opposite party to show cause why the commitment should not be quashed on the ground that the time during which the sanction remained in force had expired before the prosecution was commenced.

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* Criminal Revision No. 455 of 1894, against the order passed by Babu Sures Chandra Singha, Deputy Magistrate of Noakhally, dated the 19th of July 1894.

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Mr. *Jackson* and Babu *Basanta Kumar Bose*, for the petitioner in support of the rule.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*), for the Crown showed cause.

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

JUDGMENT.

[178] This is a rule to quash a commitment to the Sessions Court on the ground that the prosecution was commenced after the expiration of the period during which the necessary sanction for the prosecution under s. 195, Criminal Procedure Code, was in force. It appears that in consequence of certain proceedings in the Civil Court, the Munsif of Lakhipur, in the district of Noakhali, on the 5th of September, 1893, sanctioned the prosecution of the petitioner on charges under ss. 192 and 471 of the Penal Code. The petition for the criminal prosecution was not, however, presented, till the 7th of March 1894. The objection was at once taken that under s. 195, Criminal Procedure Code, the sanction of the 5th of September, 1893, was no longer in force. But this objection was overruled on the ground that the last few days were close holidays. The enquiry accordingly proceeded, and on the 19th of July last the petitioner was committed to take his trial before the Court of Session on charges of perjury and forgery. It is contended on behalf of the petitioner that six months having elapsed from the date of the sanction, the Magistrate was debarred by s. 195 from taking cognisance of the offence, and that therefore his proceedings were without jurisdiction. Section 195, after declaring that no Court shall take cognisance of offences like those with which the petitioner is charged, except with the previous sanction or on the complaint of the Court in which the offence was committed, or of some other Court to which such Court is subordinate, goes on to say that "no such sanction shall remain in force for more than six months from the date on which it was given." This provision was introduced into the present Code in order that the charge may not be held *in terrorem* over the person sought to be charged indefinitely. It is true that March 4th, 1894, was a Sunday, and March 5th and 6th were Civil Court holidays, and the Deputy Magistrate in his explanation says that the Criminal Courts were also closed on those dates. But we are not aware of any provision of law under which the period during which the sanction may remain in force can be extended in consequence of that fact. Section 7 of Act I of 1887 will not apply, as the Code of 1882 was passed before, and not after, the passing of that Act (see s. 2).

[179] In the case of *Joydeo Singh* v. *Harihar Pershad Singh* (1) the period of six months had been allowed to expire without any prosecution being instituted, and a fresh sanction was applied for and obtained. But this Court held that, even assuming that a fresh sanction could be granted, a point which the learned Judges did not decide, it should not have been granted unless some explanation was given for the omission to commence the proceeding within six months, and the order for sanction was set aside. In the present case we think that the proceeding, not having been instituted within six months from the date of the sanction, the Magistrate had no power to take cognisance of the offence, and his proceedings therefore are void. Mr. Leith has drawn our attention to

(1) 11 C. 577.

the provisions of s. 537 of the Code, but that section is expressly made subject to the provisions before contained, and we cannot therefore suppose that it was intended to override the provisions of s. 195. Nor can it refer to a case in which the want of sanction was directly brought to the notice of the Magistrate at the commencement of the proceedings before him. Nor can we say that there has not been a failure of justice in the prosecution of the petitioner after the period, for which the sanction was in force, had expired. We accordingly make the rule absolute and quash the commitment of the petitioner. The petitioner will be discharged.

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H. T. H. *Rule made absolute and commitment quashed.*

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APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Hill.

GUNGA NARAIN GOPE (*Plaintiff*) v. KALI CHURN GOALA AND OTHERS (*Defendants.*)* [28th August, 1894.]

Transfer of Property Act (IV of 1882*), s.* 54*—Delivery of possession under deed of sale unregistered where registration is optional —Delivery of property—Share in a tank —Tangible immoveable property—Question of fact—Second appeal.*

The defendants purchased a share in a tank in 1884, and the consideration being of a less amount than Rs. 100 and registration therefore optional, [180] the deed of sale was unregistered. In 1886 the plaintiff purchased the same share from the same vendor under a registered deed of sale. It was found on the facts that the plaintiff purchased with notice of the defendants' previous purchase, and that the defendants had possession of the purchased share from the date of their purchase. *Held*, on appeal under the Letters Patent of the High Court, by TREVELYAN, J., upholding the decision of BEVERLEY, J., (HILL, J., dissenting), that the possession obtained by the defendants was a sufficient "delivery of the property" within the meaning of s. 54 of the Transfer of Property Act. *Makhan Lall Pal* v. *Bunku Behari Ghose* (1) referred to.

Per TREVELYAN, J.—It is not necessary that there should be any formal making over of possession.

Per HILL, J.—When the owner of immoveable property of a value less than Rs. 100 has executed to the intending buyer an instrument purporting to transfer the ownership of the property, and the instrument has not been registered, but the intending buyer has been placed in possession, the effect to be attributed to the delivery of possession depends on the intention of the parties, which is a question of fact that cannot be determined on second appeal.

[F., 5 Ind. Cas. 57=7 M.L T. 372; R., 4 Ind. Cas. 1135=5 M.L .T. 263; 6 Ind. Cas. 763; 17 M L.J. 469 (471); 2 O.C. 74 (76); U.B.R. (1897—1901) Vol. II, 573; 2 Ind. Cas. 413; D., 34 C. 207=5 C.L.J. 390.]

THIS was a suit for declaration of title to, and recovery of possession of, a two annas share of a tank.

The plaintiff was the owner by inheritance of a two annas share in the tank, and the defendants 1, 2, and 3 each also owned a two annas share. The remaining eight annas share was owned by two widows Felumoni Goalini and Nayanmoni Goalini.

The plaintiff alleged that he purchased the eight annas share of the tank under a registered deed of sale executed in his favour by Felumoni and Nayanmoni in Assin 1293 (September 1886); that in 1295 (1888) he

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* Appeal under s. 15 of the Letters Patent No. 39 of 1894 against the decree of the Hon'ble Henry Beverley, one of the Judges of this Court, dated the 17th of May 1894 in appeal from Appellate Decree No. 1132 of 1893.

(1) 19 C. 623.

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sold his ancestral two annas share and also six annas of the share he had purchased to other persons who were made *pro forma* defendants in the suit; and that in 1298 (1891) the defendants 1, 2, and 3 refused him any share in the produce of the tank, and so dispossessed him of his remaining two annas share, for possession of which he sued.

The defendants 1, 2 and 3 alleged that they had purchased the eight annas share owned by the widows by a deed of sale dated Bhadro 1291 (August 1884), and the consideration being less than Rs. 100 the deed was unregistered, and that they had been in possession of a fourteen annas share of the tank ever since that [181] date; they also alleged that the plaintiff, when he purchased the eight annas share, was aware of the defendants' previous purchase.

The only issue raised material to this report was whether the defendants had previously purchased the eight annas share as they alleged, and, if so, whose purchase, the plaintiff's or the defendants,' was entitled to preference.

The Munsif on the evidence upheld the defendants' purchase and found "that the plaintiff purchased with notice of the defendants' previous purchase, and that the defendants had possession of the purchased share from the date of their purchase." He therefore dismissed the suit.

Ths District Judge on appeal agreed with the Munsif as to the defendants' purchase and their possession, and continued :—

"I should therefore have been prepared to uphold the lower Court's judgment but for the following objection. Allowing that the plaintiff had notice of the defendants' possession, it is necessary further to show that the defendants were in possession under a legal title; otherwise it cannot be held that the defendants' notice was of a nature to defeat his subsequent purchase. Now the position of the defendants was this. They had purchased, it is said, for a sum less than Rs. 100 and had obtained possession under that purchase. But inasmuch as they had purchased by means of a deed of sale, they can prove the terms only by reference thereto. Now the deed was unregistered. Under s. 54 of the Transfer of Property Act, however, registration was compulsory; *Makhan Lall Pal* v. *Bunku Behari Ghose* (1). If there had been delivery of possession without a writing but for a consideration less than Rs. 100, that would be a good sale, but if there was a writing, then, without registration, there would be no sale, or at least no sale that can be proved; for, unless the writing be exhibited, we cannot know the amount of consideration, and, unless we do, we cannot find that the terms of the sale were such that it could be effected by delivery of possession; for under s. 91 of the Evidence Act the terms cannot be proved excepting from the writing itself. The ruling quoted shows that if there is a writing registration is compulsory, and, that being so, ss. 17 and 49 of the Registration Act will prevent the principal defendants' unregistered conveyance from being exhibited, and will thereby shut them out from proving that their purchase was a valid one under the Transfer of Property Act, s. 54."

For these reasons the Judge held that the defendants' deed of sale was not admissible in evidence, and that their case therefore failed. He therefore reversed the decision of the Munsif and gave the plaintiff a decree.

[182] The defendants appealed to the High Court.

The judgment was as follows :—

(1) 19 C. 623.

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BEVERLEY, J.—It seems to me that there is a manifest error of law in the judgment of the lower appellate Court in this case. In point of fact the learned pleader for the respondent has not attempted to support that judgment.

The District Judge has found that the plaintiff purchased with notice of the defendants' prior purchase and possession. But he has found that the purchase was invalid because the deed by which it was effected, although accompanied by possession, was not registered. He says: "Now the position of the defendants was this: They had purchased, it is said, for a sum less than Rs. 100, and had obtained possession under that purchase. But inasmuch as they had purchased by means of a deed of sale they can prove the terms only by reference thereto. Now the deed was unregistered. Under s. 54 of the Transfer of Property Act, however, registration was compulsory; *Makhan Lall Pal* v. *Bunku Behari Ghose* (1). If then there had been delivery of possession without a writing, but for a consideration less than Rs. 100, that would be a good sale; but if there was a writing, then without registration there would be no sale, or at least no sale that could be proved; for, unless the writing be exhibited, we cannot know the amount of consideration, and, unless we do so, we cannot find that the terms of the sale were such that it could be effected by delivery of possession; for, under s. 91 of the Evidence Act, the terms cannot be proved excepting from the writing itself."

Now it seems to me that the District Judge has altogether misapprehended the law, and the decision of the Full Bench to which he has referred. Section 54 of the Transfer of Property Act declares that in the case of tangible immoveable property of less than Rs. 100, the "transfer may be made either by a registered instrument or by delivery of the property." But the section does not say that, if the delivery of the property is accompanied by a deed, that deed must necessarily be registered. Nor is that the decision of the Full Bench. What the Full Bench says is that "a transfer of ownership by sale of tangible immoveable property of a value less than Rs. 100 can be made only by a registered instrument or [183] by delivery of the property, and that if made otherwise, as in the case now before us, by an unregistered instrument, *unaccompanied by possession*, the transfer of sale is inoperative, and so it confers no title in the vendee." In other words, if the transfer is made by a deed, and there is no delivery of possession at the time, then the transfer is only valid if the deed is registered.

Now in this case the Judge has found as a fact that the defendants have obtained delivery of possession of their vendors' eight annas share, and that possession was sufficient to effect the legal transfer of the property. The possession, however, might be accompanied by the execution of an instrument, but it does not follow, either from s. 54 of the Transfer of Property Act or from the decision in *Makhan Lall Pal* v. *Banku Behari Ghose* (1), that if there is such an instrument it must be registered, and that it will be inoperative if not registered. That in fact would be to nullify the provision of the Registration Act which makes the registration of a conveyance of property of a value of less than Rs. 100 optional and not compulsory. What s. 54 says, and what the Full Bench case says, is that where the transfer is effected by means of an instrument without delivery of possession, in that case the instrument must be registered or the transfer is invalid.

(1) 19 C. 623.

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The decree of the lower appellate Court must, therefore, be set aside, and that of the first Court restored. The appellant will have his costs in both the appellate Courts.

From this decision the plaintiff appealed under s. 15 of the Letters Patent, the only material ground being that the possession which the defendants obtained did not constitute "delivery of property" within the meaning of s. 54 of the Transfer of Property Act, so as to make the sale a valid one.

Babu *Nalini Runjan Chatterjee*, for the appellant.

Babu *Sarada Churn Mitter* and Babu *Kali Churn Banerjee*, for the respondents.

The following judgments were delivered by the Court (TREVELYAN and HILL, JJ.):—

JUDGMENTS.

TREVELYAN, J.—The question in this case depends upon the [184] construction to be placed upon s. 54 of the Transfer of Property Act. On the findings of fact of the Court below, the property, which is an 8-anna share of a tank, was sold to the defendants for a sum less than Rs. 100 by an unregistered deed of sale; the defendants obtained possession under that purchase. They possessed the share after their purchase, to use the words of the Munsif, which, as appears later in his judgment, means from and after that purchase. Their vendors never had possession after the purchase. It is also found that the plaintiffs, who have obtained a registered conveyance from the same vendors, took with notice of the defendants' previous purchase and possession. Section 54 says this: "Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property." I do not think it is necessary that there should be any formal making over of possession. It can scarcely be supposed that the Legislature, while making provision for transactions which would mostly be between poor people, would insist upon very strict formalities. Where the vendee obtains possession on the date of the sale and remains in possession thereafter, I think it is reasonable to presume that the possession so obtained was a lawful one, and had been given by, or with the assent, express or implied, of the person previously in possession, namely, the vendor. As was pointed out in the argument, it is not easy to see what formality of delivery would be required in the case of an undivided share of a tank. I think it follows from the facts of this case that the buyer was placed in possession by the seller, and, if so, the law has been complied with. The difficulties in this case arise from the existence of the unregistered deed of sale. If there were no deed of sale, the case would be a clear one. As the law stands, the deed of sale has no operation to transfer the property, though it may show the payment or promise of a price, which, *plus* the transfer of ownership, constitutes a sale.

I am not prepared to say that Mr. Justice Beverley's decision is wrong. I would therefore dismiss this appeal with costs.

HILL, J.—I have given the question argued before us in this appeal a good deal of consideration, and I have also had the opportunity of considering the judgment which has just been [185] delivered by Mr. Justice Trevelyan. It is with regret that I find myself unable to agree in the view which he takes of the construction to be placed on s. 54 of the Transfer of Property Act, and I regret this the more since his opinion is in accord with that of the learned Judge from whose decree this appeal

has been preferred. But it seems to me that when the owner of immoveable property of a value less than one hundred rupees has executed to the intending buyer an instrument purporting to transfer the ownership of the property, and the instrument has not been registered, but the intending buyer has been placed in possession, the effect to be attributed to the delivery of possession depends on the intention of the parties, which is a question of fact that cannot be determined in second appeal. For reasons, however, into which I do not now propose to enter, I agree that this apeal ought to be dismissed with costs.

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J. V. W. *Appeal dismissed.*

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APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Norris and Mr. Justice O'Kinealy.

R. JOSHUA AND OTHERS (*Defendants*) v. ALLIANCE BANK OF SIMLA (*Plaintiffs.*)* [27th July, 1894.]

Transfer of Property Act (IV of 1882), *s.* 53—*Statutes* 13 *Eliz., c.* 5 *and* 27 *Eliz., c.* 4—*Voluntary transfers as against creditors or subsequent transferees for consideration —Notice—Registration—Duty of mortgagee in searching for prior incumbrances—Post-nuptial settlement with power of appointment to wife—Deed of appointment in favour of children—Secrecy as evidence of fraud—Subsequent mortgage by wife and trustee of settlement without mention of deed of appointment.*

In 1870 the defendant *J* and her husband executed a post-nuptial settlement, by which they assigned certain Municipal debentures to the defendant *E* (the brother of *J*) and one *G* "upon trust for *J* during her life and after her death as she should by deed or will appoint," and subsequently the trustees, in pursuance of a power given them by the settlement, sold the debentures and invested the proceeds in house property in Calcutta, such house and premises thereafter representing the trust property, and being held by the trustees on the trusts of the settlement. On 17th December 1878 *E* retired from the trust and made over his interest to the remaining [186] trustee *G*, and on the same day *J* executed a deed of appointment in favour of her children. representing to her solicitor that she did so to protect the property from her husband. The deed of appointment was witnessed by *E* and was duly registered, but it was not mentioned in the deed which assigned the trust property to *G*, and no information of it was given to him, the deed remaining in *J's* custody and not being made over to *G*, In 1884 *G* retired from the trust and *E* became sole trustee in his place. In March 1884, money was raised by *J* and *E* on mortgage of the trust property to *G*. but no mention of the deed of appointment was made in the mortgage deed. *J's* husband died in October 1884, but neither then, nor on the occasion of another mortgage of the property in 1888, was any mention made of the deed of appointment, and there was nothing on the record of the case to show that the husband was ever in needy circumstances, or pressed his wife for money, or that he died leaving no property. In 1890 *E* and *J* mortgaged the house and premises to the plaintiffs, the mortgage-deed (which was duly registered) reciting the settlement of 1870, and that "*J* has not made any irrevocable appointment of the said trust premises under the power of appointment given to her in the said settlement," but making no mention of the deed of appointment executed by her in 1878 A deed of further charge was also executed by *J* and *E* in 1891 in favour of the plaintiffs, also without any mention of the deed of appointment; this was also duly registered. Before execution of the mortgage of 1890 the plaintiffs' solicitors did not search theregister of the deeds further back than 1884, because they were dealing with persons who must have known of the exercise of the power of appointment, and who had given a covenant that no such exercise had been made, and because they then found that *G*, the former trustee, had taken a similar security himself in 1884, and must have been satisfied that no such blot existed on the

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* Original Civil Appeal No. 9 of 1894 in Suit No. 281 of 1892.

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title. They had moreover a letter from *G*'s solicitors saying that they had searched the register up to 1884. *J* first set up the deed of appointment as a defence in the present suit, which was brought on the mortgages against *E* and *J* and their children, and in which the plaintiffs sought to recover the amount advanced with interest, and prayed that the deed might be declared void as against them. In this suit *E* did not appear. The principal grounds of defence were that the mortgage deeds were not explained to *J*, that she was ill at the time and left all the transactions to her brother *E*, and that she did not know the contents of the deeds which she contended were therefore not binding on her; that the deed of appointment was made in consideration of her natural love and affection for her children; and that the plaintiffs had notice of it. On the facts the lower Court (SALE, J.) found that she had full and complete knowledge of the contents of the mortgage deeds, and was bound by them, and that there was gross fraud towards the plaintiffs' on the part of *E* in suppressing the fact of the existence of the deed of appointment. *Held* by SALE, J., that, according to the law which existed in India prior to the passing of the Transfer of Property Act, the deed of appointment was a voluntary conveyance and fraudulent within the meaning [187] of the Statute 27 Eliz., c. 4, and void as against the plaintiffs as subsequent transferees for valuable consideration; the legal presumption of fraud, which the Court was entitled to make on the cases decided on that statute, rendering the question of notice or no notice immaterial. *Judah* v. *Abdool Kurreem* (1), *Doe d. Otley* v. *Manning* (2), *Doe d. Newman* v. *Rusham* (3), and *Godfrey* v. *Poole*(4) referred to.

Section 53 of the Transfer of Property Act has not altered the law in that respect. The deed of appointment came within the definition of "transfer of property," given in that Act, there being nothing in the Act to suggest that it was intended to confine its operation to transfers by contract. The words of s. 53 "may be presumed to have been made with such intent as aforesaid," (*i.e.*, with a fraudulent intent), should be construed in accordance with the cases decided under the Statute 27 Eliz., c. 4.

Even assuming that it was intended by s. 53 to exclude voluntary conveyances of which a subsequent transferee had notice from the presumption of fraud, *Held*, on the facts, that the plaintiffs had no notice of the deed of appointment. The doctrine of notice, if applied, must be applied in accordance with, and subject to, the definition of notice given in the Act itself. There was no actual notice, and there was not such an "abstention from inquiry or search" on the part of the plaintiffs as to fix them with constructive notice. The words "wilful abstention from inquiry and search" mean such abstention as would show want of *bona fides* on the part of the plaintiffs in respect of this particular transaction. *Agra Bank* v. *Barry* (5) referred to.

Held, also, that the doctrine of registration amounting to notice, as laid down in the case of *Lakshmandas Sarupchand* v. *Dasrat* (6), had no application to the present case. Having regard to the terms of s. 53 of the Transfer of Property Act, that doctrine, if applicable, can only apply for the purpose, either of rebutting the presumption of fraud or of preventing the presumption of fraud from arising. If the true meaning of that section be that the Court is to presume fraud only in accordance with the facts of each particular case the facts of the present case were amply sufficient to raise the presumption as regards the deed of appointment. That deed, therefore, was fraudulent as against the plaintiffs, and they were entitled to a declaration that it was void and inoperative as against them.

Held on appeal (by PETHERAM, C.J., and NORRIS and O'KINEALY, JJ.) that, looking to the unusual way in which the transaction as to the deed of appointment was carried out and the secrecy given to it, the result of which was to enable *E* and *J* to raise money on the trust property by inducing persons to believe that the whole title lay in themselves alone, and on the other facts in the case, apart from the presumption which might be made under s. [188] 53 of the Transfer of Property Act, where a transfer is made gratuitously for a grossly inadequate consideration, *viz.*, that it may be presumed to have been made to defraud or defeat creditors, the decree of the Court below was correct.

[R., 25 B. 202 (208); 7 Bom.L.R. 267; 13 C.P.L.R. 43; 17 C.P.L.R. 24 (27); 24 M.L.J. 664 (671)=(1913) M.W.N. 525 (531)=14 M.L.T. 237 (243)=20 Ind. Cas. 385 (390); P.L.R. (1900) 513 (522)=6 P.R. 1901.]

(1) 22 W.R. 60. (2) 9 East. 59. (3) 17 Q. B. 724.
(4) L.R. 13 Ap. Cas. 497. (5) L.R. 7 E. and Ir. 135. (6) 6 B. 168.

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APPEAL from a decision of Sale, J., sitting as a Judge of the High Court in its original civil Jurisdiction, dated 23rd February 1894.

The plaint (which after being filed was allowed to be amended) stated that, on the 16th October 1890, the plaintiff Bank lent and advanced to the defendants Joseph Ezra Simon Elias and Sarah Joshua, Rs. 42,000, and by an indenture cf mortgage of the same date and made between the defendant Elias of the first part, the defendant Sarah Joshua of the second part, and the plaintiff Bank of the third part (after reciting that by a settlement, dated 15th June 1870, certain Municipal debentures were assigned by the defendant Sarah Joshua and her husband Raphael Joshua now deceased, to the trustees thereof, the defendant Elias and one E. S. Gubboy, upon trust for the defendant Sarah Joshua during her life, and after her decease as she should by deed or will appoint, with power to the said trustees to call in the moneys secured by the said debentures, and to invest the same in the purchase of real property in Calcutta, and after reciting that the trustees of the said settlement had sold the said debentures and had invested the proceeds thereof in the purchase of the house and premises, 46 Dhurrumtollah Street, in Calcutta, and that the defendant Elias was then the sole trustee of the settlement, and that "the defendant Sarah Joshua has not made any irrevocable appointment of the said trust premises under the power of appointment given to her in the said settlement,") the defendant Elias, so as to bind himself and his successor in office of trustee of the therein recited settlement, and the defendant Sarah Joshua did covenant with the plaintiff Bank and their assigns to repay the sum of Rs. 42,000 to the plaintiff Bank on the 31st of December then next, with interest at 7 per cent. per annum, and also all law costs, charges and expenses as between attorney and client which might be incurred by the plaintiff Bank or their assigns in connexion with that security, or in realizing or attempting to realize the moneys thereby secured, and whether by sale or attemped sale of the mortgaged premises, or by suit or otherwise; that by the said mortgage the defendant Sarah Joshua [189] revoked all appointments theretofore made by her under the power given to her by the said settlement, and in exercise of the said power of appointment, and of every and any other power enabling her in that behalf did appoint and by virtue of her estate and interest therein did grant, transfer and convey, and the defendant Elias did grant, transfer and convey, to the plaintiff Bank and their assigns the house and premises, 46 Dhurrumtollah, but subject to redemption on payment by the mortgagors of the sum of Rs. 42,000 with interest and costs as aforesaid, to the plaintiff Bank. Provision was made in the deed that if the interest was punctually paid and the other covenants and agreements therein duly observed, the plaintiff Bank would not call in the sum lent before 31st December 1891, and afterwards would not call it in without giving six months notice in writing to the defendants; that on 9th April 1891 the plaintiff Bank lent to the defendants a further sum of Rs. 8,000 and took from them a deed of mortgage by way of further charge, which provided that the money should be repaid on the 30th June 1891 with interest at 7 per cent. per annum; that the house and premises, 46 Dhurrumtollah, should be a security for and charged with payment of the Rs. 8,000, and containing similar provisions as to the continuance of the loan, as to notice, and for securing its payment, as had been made in the former mortgage deed; that the defendants made default in payment of the interest due on both loans on 30th June 1891, and by notice in writing, dated 9th December

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1891, the plaintiff Bank called for payment of the principal money and interest thereon under the mortgage and further charge, and it not being paid they filed this suit to recover the amounts due under both deeds.

The defendant Elias did not appear. The defendant Sarah Joshua filed a written statement, in which she stated that the Municipal debentures for Rs. 11,000 were, by a post-nuptial settlement, dated 15th June 1870, and made between her husband Raphael Joshua now deceased and herself of the first part, transferred to the defendant Elias and one E. S. Gubboy as parties of the second part on trust to pay the interest, dividends, or income to the defendant Sarah Joshua for life for her separate use without power of anticipation, and after her decease as she should by deed or will appoint. Under the settlement [190] the trustees had power to continue the investment or to sell out and invest the proceeds in real property in Calcutta, and that they eventually sold the debentures and purchased the house and premises, 46 Dhurrumtollah Street; that the defendant Elias retired from the trust in 1878, and from that time until 1884, when the other trustee Gubboy retired Gubboy alone acted as trustee; that the defendant Elias was re-appointed trustee in 1884, and had since been the sole trustee of the settlement; that by a deed of appointment, dated 17th December 1878 (and subsequently duly registered) the defendant Sarah Joshua, in exercise of the power given her by the settlement, appointed that from and after her death the trustees or trustee of the settlement should stand possessed of the trust property (subject to the trusts of the settlement) in trust for all the children of the defendant Sarah Joshua by her husband Raphæl Joshua, of whom there were now alive Simon Raphæl Joshua of the age of 20, Luna Raphæl Jhoshua of the age of 19, and Elias Rapæl Joshua of the age of 17½ years. The defendant Sarah Joshua admitted signing two documents, which she believed were the deeds of mortgage and further charge sued upon, "but at the time she was too ill to leave her carriage, she signed the same in various parts thereof at the suggestion and request of the other defendant, and the Registrar came out to her carriage and took her acknowledgment, without her knowing or having explained to her the nature and contents thereof, and she denies that she ever received the sums of Rs. 42,000 and Rs. 8,000 alleged to have been advanced on the security of the said indenture of mortgage and further charge, or any portion thereof."

She submitted that the appointment made by her was an irrevocable appointment, and that she had no power to assign the trust properties to the plaintiff Bank, that neither she nor the other defendant jointly or severally had power to mortgage such properties, and that the deeds of mortgage and further charge were invalid so far as they purported to bind the trust properties. She further submitted that her children were necessary parties to the suit, and that the suit ought to be dismissed as against her.

After this written statement had been filed the plaintiff Bank were allowed to amend the plaint, and the children of the defendant [191] Sarah Joshua were added as parties defendants. As to the alleged deed of appointment the plaintiff Bank in the amended plaint stated that they advanced the sums of Rs. 42,000 and Rs. 8,000 in good faith and without any notice of such deed of appointment, and that the said deed of appointment was executed by the defendant Sarah Joshua with intent to defraud subsequent transfers for consideration of the house and premises

charged by the deeds of mortgage and further charge; that at the time of obtaining from them the said advances and executing the said deeds of mortgage and further charge, the defendants Elias and Sarah Joshua wilfully and fraudulently concealed from the plaintiff Bank the fact that the said deed of appointment had been executed, and falsely and fraudulently represented to the plaintiff Bank that no such appointment had ever been made; that the plaintiff Bank was deceived by the said representation and was induced to lend the said sums in the *bona fide* belief that such representation was true, and that if the plaintiffs had been aware of the existence of any such deed of appointment they would never have lent any money to the defendants on the security of the said house and premises. The plaintiff Bank submitted that the deed of appointment was made gratuitously and without consideration, that its effect if upheld would be to defraud them, and that it was wholly void and of no effect as against them.

They prayed for the usual mortgage decree; that if necessary the deed of appointment might be declared void as against them; and for a receiver.

A written statement was filed by the children of the defendant Sarah Joshua and a supplemental written statement by the defendant Sarah Joshua from which it appeared that Raphael Joshua, the husband of Sarah Joshua, died on the 15th October 1884.

These written statements alleged that the deed of appointment was duly registered on the 17th December 1878, and that the plaintiff Bank therefore had notice of it; that the settlement of 15th June 1870 did not reserve to the defendant Sarah Joshua any power to revoke any power of appointment which she might make under it, and that the deed of appointment was irrevocable; that it was not executed with intent to defraud subsequent transfers [192] as alleged in the plaint, that it was not executed gratuitously and for no consideration, but it was made in consideration of the natural love and affection of a mother towards her children. The defendant Sarah Joshua denied the charges in the plaint as to her intention in the execution of the deed of appointment, or that she represented that no such deed had been made, nor had she fraudulently concealed its existence from the plaintiff Bank. She stated that "they had notice of the appointment, or by due diligence might have had notice of it, and were aware, or might with due diligence have become aware, of its existence, purport and effect." The children stated that they were the only persons now entitled under the deed of appointment, and they denied that the trust property was vested in the defendant Elias at the date of the execution of the mortgage and further charge, so as to give him any right to alienate or encumber the same

The judgment appealed from, in which the further facts and the effect of the evidence is stated, was as follows:—

SALE, J.—In this case a great many questions have been raised, and a great many authorities cited, but, from the view I take of the facts, it is not, I think, necessary that I should take time to consider the various points which have been discussed.

The suit has been brought on a mortgage, dated 16th October 1890, and further charge, dated 9th April 1891. Both these documents were executed in favour of the plaintiff Bank by two persons, the defendants Joseph Ezra Simon Elias and Sarah Joshua. The recitals in the earlier deed, so far as it is necessary to refer to them, are as follows: First, it is recited that under an indenture, dated the 15th June 1870, made between

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Raphael Joshua, the husband of Sarah Joshua, and the said Sarah Joshua of the one part, and Joseph Ezra Simon Elias and one Elias Shalome Gubboy of the other part, certain Municipal debentures of the value of Rs. 11,000 were paid to Joseph Ezra Simon Elias and Elias Shalome Gubboy to hold in trust for the defendant Sarah Joshua to her separate use for life, and after her decease as the said Sarah Joshua should by any deed or by will or codicil appoint. And then after reciting the sale of the debentures and the investment of the proceeds in the premises, 46 Dhurrumtollah Street, and that by reason of various mesne assignments the [193] property was now vested on the trusts mentioned in Joseph Ezra Simon Elias, and then reciting that the defendant Sarah Joshua had not made any irrevocable appointment of the trust premises under the power of appointment by the recited settlement reserved to her, and that as both the defendants Elias and Sarah Joshua had applied to the plaintiff Bank to lend them Rs 42,000 upon the security of the mortgage intended to be executed, it proceeds, that the parties—the defendants Elias and Sarah Joshua—do by the deed of transfer, convey and assign whatever interest they have in the premises to the Bank as a mortgage security for the money advanced. Then there are personal covenants by the defendants Elias and Mrs. Joshua in respect of this loan to repay the same with interest to the Bank. The document of further charge is of the usual nature, and it is provided that the amount intended to be advanced, Rs. 8,000, should be secured in the same way as the Rs. 42,000 had been secured by the previous deed. There is no question that the consideration mentioned in both these deeds was paid by the Bank to the defendant Elias. Subsequently, after due notice to the parties, the Bank, in May 1892, filed this suit against the defendants Elias and Sarah Joshua to recover the amount due under the mortgage and further charge, and they asked for the usual decree.

In the written statement which was put in on behalf of the defendant Sarah Joshua (the defendant Elias not having appeared in the suit) there were two main grounds of defence raised. In the third paragraph she says: "That by a deed of appointment, dated the 17th of December 1878, the defendant, in exercise of the power given to her in that behalf, did appoint trustees of the settlement deed from and after the decease of this defendant to stand possessed of all the trust funds and property subject to the trusts of the said settlement in trust for all the children of this defendant upon the terms and conditions in the said deed set forth."

And then as regards the mortgage and further charge she says in the fifth paragraph that she "signed the same at the suggestion and request of the other defendant without her knowing or having explained to her the nature and contents [194] thereof." She denies having received the Rs. 42,000 or Rs. 8,000 said to be advanced on the security of the mortgage and further charge, and then she proceeds "the defendant submits that the appointment made as aforesaid by the said deed of appointment, dated the 17th day of December 1878, is an irrevocable appointment, and that she had no power to appoint the said trust properties to the plaintiff Bank; that neither she nor the said other defendant jointly or severally had power to mortgage the said trust properties." And she submitted that her children, whom she mentions in her written statement, were necessary parties to the suit.

Upon that written statement being put in the plaintiff Bank applied to have the children therein mentioned made parties to the suit, and

to have such alterations in the body of the plaint made as were necessary by reason of the children being added as parties and also by reason of the particular defence set up.

As to the amendments made in the plaint it is only necessary to say that the plaintiff Bank set out more fully in the body of the plaint the terms and provisions of the settlement and the indenture of mortgage, and then they set up that the power of appointment was invalid as against them, and that in fact the existence of the power of appointment was concealed from them fraudulently, and that, moreover, they advanced these various moneys without notice of such deed of appointment and they charge that "such deed of appointment was executed with intent to defraud subsequent transfers of the said house and premises for consideration."

In the prayer they ask that it may be declared that the said deed of appointment of the 17th of December 1878 is wholly void and of no effect as against the plaintiff Bank. In the written statements put in (a further written statement by Mrs. Joshua and a written statement by the children) besides the defence to which I have already alluded, these defendants deny that the Bank advanced the moneys without notice of the deed of appointment of 1878, and they allege that the Bank had notice thereof. They also deny that the deed of appointment was executed gratuitously and without consideration, and they say it was made in consideration of the natural affection of the defendant Mrs. Joshua towards her children [195] and her husband. So that, so far as the facts are concerned, the main defence is that the lady, Mrs. Joshua, not having had the deeds explained to her, and not having known their contents at the time of execution and registration, these deeds are not binding against her. There is the further question of notice which I shall deal with presently.

It is to be observed that in the defence no suggestion is made that either the mortgage or further charge was in any sense a fraud against the defendant Mrs. Joshua by reason of the conduct of the Bank, nor is there any allegation that, whatever Elias did in respect of the mortgage or further charge, he had not authority from Mrs. Joshua to act as he did; nor is it suggested (apart from the denial by Mrs. Joshua that she received any part of the consideration) that there has been any misapplication or misappropriation of these funds by the defendant Elias. Mrs. Joshua has been examined under a commission. She says that she had no knowledge of the actual contents of the deeds of mortgage or further charge. Even if that were so, such want of knowledge would be immaterial for the purposes of the issue as to her liability in respect of the mortgage and further charge.

She has stated in her evidence that in 1890, the date of the mortgage, she knew that money was required for the purpose of improving the property, and she says in so many words that the reason for her not looking into the two documents, the mortgage and further charge, was the absolute confidence she had in her brother, the defendant Elias, to whom she had left the entire management of the business connected with the loan to be obtained from the plaintiff Bank. That being so, I think it must be taken against her, and as between her and the Bank, that she had full and complete knowledge of all that was contained in both the documents. I am satisfied that at the time she executed them she knew the nature of them, at least to this extent, that they were intended to bind the trust property as security for the money Elias was raising from the plaintiff

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Bank. So far as the first contention is concerned I have no hesitation, therefore, in finding that Mrs. Joshua is bound by the deeds of mortgage and further charge.

But the more important point is as to the effect of the deed of appointment of 1878, so far as the Bank is concerned; and for the [196] purpose of considering this point, it is necessary, perhaps, to state, in some detail, the transactions which have taken place in respect of this trust property, and to show in what respect Mrs. Joshua has been concerned with these transactions.

It appears that Mrs. Joshua was married some time in May 1870. After her marriage, and on the 15th of June 1870, the deed of settlement, which is recited in the mortgage, was executed. The deed of settlement does not refer to any marriage consideration in respect of the trust proposed to be created, but the recital is that by desire of Simon Elias, who was the father of Mrs. Joshua, certain Municipal debentures, which belonged to Simon Elias, were delivered to Sarah Joshua upon the agreement and with the consent of the said Sarah Joshua that the same should be settled on the said Sarah Joshua upon the trusts thereinafter mentioned.

It is not necessary to recite these trusts inasmuch as they are sufficiently recited for the present purpose in the deed of mortgage. Shortly after the deed of settlement was executed, in 1872, apparently, these debentures were sold out and the proceeds invested in the purchase of the present mortgaged premises.

In order to raise the full amount of the purchase-money required, the premises were mortgaged to one A. S. Gubboy, who, I understand, is the brother of E. S. Gubboy, one of the trustees appointed by the deed of settlement.

The money so raised, Rs. 7,000, with the proceeds of the debentures Rs. 13,000, formed together the purchase-money of the premises, and the premises in question were conveyed to the trustees but without any mention of the trust. Mrs. Joshua says in her evidence that she was aware of the purchase of these premises, and that the debentures had been sold, and the balance of the purchase money for these premises had been obtained from A. S. Gubboy by means of the mortgage of these premises to him.

The property seems to have remained in the individual names of these trustees till the year 1878. On the 17th of December 1878 two transactions took place connected with this property. There was a deed of appointment executed by Mrs. Joshua in favour of her children, and, furthermore, the defendant Elias, who is the brother of Mrs. Joshua retired from [197] the trust, and there was a conveyance of the property to the remaining trustee on the trusts contained in the deed of settlement. Mr. Gregory who has been called as a witness acted as the attorney in respect of both these transactions.

There is no question that Elias Shalome Gubboy had no knowledge of the execution of this deed of appointment, but it is clear on the evidence of Mr. Gregory, and also from the fact that the defendant Elias is a witness of the deed of appointment, that the defendant Elias did know of the execution of that deed of appointment, and that, as a matter of fact, as she states in her evidence, Mrs. Joshua informed nobody of the fact that she had executed the deed of appointment, and that it was kept secret. Therefore the important point is that, though the property was conveyed in 1878 to Elias Shalome Gubboy, the trustee, immediately

after the deed of appointment had been executed, the fact of the appointment was not brought to the knowledge of the trustee, nor was notice given to the trustee, that he held for the benefit of any beneficiary other than Mrs. Joshua.

The next transaction takes place on the 26th March 1884. Upon that date we find that the defendant Elias returns to his position as trustee of the property, and that the trustee Gubboy retires from the trust. There is a reconveyance by Gubboy in favour of Elias for the purposes of the trusts contained in the deed of settlement. Further the retiring trustee becomes the mortgagee of these very trust premises, and his security consists of a mortgage executed in his favour by the defendant Elias as the sole trustee of the trusts of the deed of settlement with the consent and approval of the defendant Mrs. Joshua as the beneficiary thereunder. There is nothing in the deed of 26th March 1884 to suggest that anybody other than Mrs. Joshua was interested in the trusts of the deed of settlement. So far as the mortgagee Gubboy knew Mrs. Joshua was the sole beneficiary.

In 1888 the mortgagee Gubboy is paid off, and a transfer of his mortgage is taken by certain clients of Messrs. Orr, Robertson and Burton, Solicitors of this Court. From these clients of Messrs. Orr, Robertson and Burton a further sum of Rs. 6,000 was obtained, and shortly afterwards from the same people a further sum of Rs. 12,000 was obtained on loan. The security for these sums **[198]** obtained from Messrs. Orr, Robertson and Burton's clients was a mortgage of the trust premises executed by the defendant Elias alone.

As a matter of fact the loan transaction with the Bank, the subject-matter of this suit, was entered into with the object of paying off these transferees of the mortgage security originally given to Gubboy, and for raising a further sum of money in all amounting to Rs. 42,000. I think it is clear that the deed of appointment executed by the defendant Sarah Joshua was never intended by Mrs. Joshua to have the effect of restricting her own power of dealing with the trust property, nor of in any way preventing her from continuing to deal with this property just as if no deed of appointment had been executed by her.

It is quite clear that as a matter of fact she was treated as being sole beneficiary under the trusts of the deed of settlement, and it also appears sufficiently from the evidence of Mr. Gregory and of Mrs. Joshua herself that the deed of appointment was intended by her not to have further effect or force than to reserve to Mrs. Joshua sole control of the property free from possible interference or pressure, which she seems to have anticipated from her husband, whom, according to the evidence of Mr. Gregory, she seems to have regarded as somewhat of a reckless trader.

If that view of the facts is correct what took place as far as the Bank is concerned in the preliminary negotiation for this mortgage is very important.

The negotiations for the purpose of raising this money from the Bank were left entirely in the hands of the defendant Elias. On these negotiations first taking place there seems to have been a question raised as to whether the trustee had power, which he seems to have assumed in the transaction with Messrs. Orr, Robertson and Burton's clients, to give or transfer a good title to the premises, and, accordingly, a case was drawn up for the advice of counsel directed mainly to that point, and the opinion of counsel was obtained. The case and opinion were handed to the defendant Elias, and he was therefore perfectly well aware of the basis

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upon which the Bank was proceeding in respect of the loan desired from them. It is quite clear that the matter proceeded upon the basis that the defendant Mrs. Joshua was the then existing sole [199] beneficiary under the deed of settlement, and that it proceeded entirely upon the supposition that no deed of appointment had been executed by Mrs. Joshua under the power reserved to her by the deed of settlement. Furthermore one of the drafts of the proposed mortgage was also handed to the defendant Elias, and in that draft there was a distinct recital that no deed of appointment had been executed by Mrs. Joshua under that power, and there can be no question that the defendant Elias must have known, that if the Bank had reason to suppose that that power had been exercised by Mrs. Joshua in favour of third parties, whatever the legal effect of it might be, it would be a very serious obstacle in the way of the negotiations with the Bank being brought to a successful issue.

Therefore I can only characterise the conduct of the defendant Elias in wilfully suppressing the fact of the existence of the deed of appointment as gross fraud towards the Bank. It appears to me immaterial to consider to what extent Mrs. Joshua had personal knowledge of this fraudulent suppression of fact. She says she was ill at the time, and it may be that she left more entirely and completely in the hands of the defendant Elias this particular transaction with the Bank than she had some of the former transactions. But whatever was the actual state of her knowledge of the recitals of the mortgage, I am satisfied of this that Mrs. Joshua fully understood that the Bank was being dealt with on the basis of the fact that she was the only beneficiary under the trusts of the deed of settlement, and I think, moreover, she believed, and desired that the Bank should believe, that she possessed full power of executing a valid mortgage in favour of the Bank, notwithstanding the existence of the deed of appointment in favour of her children.

Now as a matter of fact the deed of appointment executed by Mrs. Joshua in favour of her children was registered, and a question has been raised as to how far the fact of the registration operated as notice to the Bank of the appointment.

The facts bearing upon this point are these: Before execution of the present mortgage the plaintiff Bank's solicitors did not search the register of deeds for a period further back than the year 1884, and the explanation given is two-fold.

[200] First, it is said they were dealing with persons who, if there existed any such deed of appointment, must have been aware of the fact, and if there was a suppression of this fact, such suppression was only possible through gross breach of faith on the part of the defendants Elias and Mrs. Joshua. There was, it must be remembered, the most positive and distinct assurance by the defendants Elias and Mrs. Joshua, as appears in the recitals of the deed of mortgage, that no such appointment had been made.

Further it appeared, in course of communication with Messrs. Orr, Robertson and Burton, that the former trustee himself, Gubboy, had taken a similar security in the year 1884, and therefore it may be presumed that the retiring trustee was satisfied that, up to that period, no blot existed upon the title to the mortgaged premises by reason of a prior exercise of the power of appointment.

There is also the letter written to the Bank's solicitors by Mr. Orr, which has been put in stating that due search for incumbrances had been

made up to the year 1884. Accordingly the only search made by the Bank's solicitors was for the subsequent period.

Turning to the deed of appointment, it is, I think, clear that, according to the law which existed in this country prior to the passing of the Transfer of Property Act, this deed was a voluntary conveyance and fraudulent within the meaning of statute 27 of Eliz., c. 4. The law as it then existed is sufficiently laid down in *Judah* v. *Abdool Kureem* (1), and according to that case it appears that a voluntary deed of transfer or conveyance, similar in character to the present deed of appointment, would have no effect as against a subsequent purchaser for consideration. It is said at page 67 of the report by Couch, C.J., as follows: "It is not necessary to say on what ground or for what reason a voluntary conveyance, where there is no express intention to defraud, is within the statute of 27 Eliz., c. 4. According to the construction which has been put upon it, when the person who has made the voluntary gift or settlement sells to another for value, the conveyance operates as a conveyance of the estate which the settlor had before the voluntary settlement; the statute puts the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser."

[201] How the statute has that operation is not explained in the judgment of the appeal Court in that case, but it is clear from the passage which I have read that the question of notice or no notice to the subsequent purchaser of the existence of the prior voluntary conveyance was immaterial. As a matter of fact it would appear that in that case the subsequent purchaser took with notice of the voluntary conveyance which he sought to have set aside, and it was in view of that fact that the opinion I have read was expressed. In *Godfrey* v. *Poole* (2), Sir Barnes Peacock cites with approval the doctrine as to legal presumption of fraud in connection with 27 Eliz., c. 4, which is contained in the case of *Doe d. Newman* v. *Rusham* (3). He says (at p. 504 of the report): "It is there laid down that the principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively against him, and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them." The case cited as to this is *Doe d. Otley* v. *Manning* (4).

So that if the law as laid down in the case of *Judah* v. *Abdool Kureem* is unaffected by subsequent legislation in this country, I think there is no doubt that the Bank would be entitled to the declaration they seek in respect of this deed of appointment.

The question is whether that law has been in any respect altered by subsequent legislation, and if it has been altered what the alteration is. It has been contended that s. 53 of the Transfer of Property Act, merely re-enacts the law such as it has been for a long series of years understood and laid down under and by virtue of statute 27 Eliz. On the other hand it has been contended that, though the Transfer of Property Act has repealed statute 27 Eliz., c. 4, still the Transfer of Property Act, itself is not

(1) 22 W.R. 60
(2) L.R. 13 App. Cas. 497.
(3) 17 Q. B. 724.
(4) 9 East. 59.

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applicable to a deed of appointment of the character mentioned in this suit. It is [202] said that the transfers to which the Transfer of Property Act, refers are transfers of a contractual and literal character, and that it was not intended to affect deeds such as I have to do with at present. I am bound to say I find no ground for that contention on the terms of the Act. It appears to me from the definition of "transfer of property" given in s. 5 that the transfer purporting to be made by the deed of appointment is a "transfer" within the meaning of the Act. There is nothing to suggest that it was intended to confine the operation of the Act to transfers by contract. The only thing one has to look to is whether the deed does or does not purport to be an act conveying property, and if it does it is a deed or act of transfer within the meaning of the Transfer of Property Act.

But now, does s. 53, alter in any respect the law such as it existed in this country at the time the Act was passed. If any such change in the law were intended it appears to me the terms of s. 53 are curiously inapt for expressing any such intention. It has been suggested that inasmuch as the presumption of fraud, which according to the doctrine laid down by the cases which have been decided under statute 27 Eliz., c. 4, applied to voluntary conveyances, as against a subsequent purchaser, was a conclusive presumption, and could not be rebutted by showing notice of the prior voluntary conveyance, the object of the present Act was to remove the conclusive nature of the presumption, and to give the Court the power of raising the presumption according to the circumstances of each particular case. In support of this contention cases have been cited in which Judges of eminence have expressed dissatisfaction as to the extent to which the doctrine of fraud, as regards voluntary conveyances, has been carried, and it is said that it was intended by this Act to exclude from the operation of this presumption voluntary conveyances of which the subsequent purchaser had notice. If that was the object intended by the Act it appears to me it would have been so declared in precise language. I think the language of the section affords no certain indication that any change in the law was intended, and I am inclined to think that the words "may be presumed to have been made with such intent as aforesaid" should be construed in accordance with the cases decided under the statute 27 Eliz., c. 4, which [203] have laid down in very unmistakeable terms what the Courts at home have considered to be the meaning of that statute throughout a very long series of years.

But even assuming that it was intended by s. 53 of the present Act to exclude voluntary conveyances, of which a subsequent purchaser had notice, from the presumption of fraud, I must, on the facts such as they appear in this case, hold that the Bank had no notice whatsoever of the existence of this deed of appointment. If the doctrine of notice is to be applied, it must, I think, be so applied in accordance with and subject to the definition of notice given in the Act itself. It is not suggested here that the Bank had actual notice, and the only contention, as far as I have understood it, is that the facts show there has been a wilful abstention from inquiry, and that, if the usual search for incumbrances had been made, the Bank would have discovered the existence of the prior deed. The words "wilful abstention from inquiry and search" must be taken to mean, in my opinion, such abstention from inquiry or search as would show want of *bona fides* on the part of the Bank in respect of this particular transaction.

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I think the observations of Lord Selborne in *Agra Bank v. Barry* (1) throw very considerable light on the question as to what is the duty which is cast upon a person to make inquiry or search, the abstention from which amounts to notice. On p. 157 of the report it is pointed out that the duty, if there is a duty, is not a duty which is owed to the possible holder of a latent title or security. It is a duty merely which a person owes to himself, and the non-performance of which, unless it is explained, affects his own *bona fides*. The passage is as follows. "It has been said in argument that investigation of title and inquiry after deeds is the duty of a purchaser or a mortgagee; and no doubt there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man, dealing *bona fide* in the proper and usual manner for his own interest, ought, by himsel for his solicitor, to follow with a view to his own title and [204] his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bona fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case."

The facts in the present case show that search was made but was not carried back beyond a certain date not with the object of avoiding discovery, but because it was presumable that nothing could have occurred previously affecting the title. Such abstention, if wilful in the sense that it was of set purpose, is not so in the sense that it was of fraudulent purpose. The explanation, therefore, entirely exonerates the Bank from any suggestion or suspicion of want of *bona fides*.

The question how far registration of a document amounts to notice of its existence, which was considered by the Bombay High Court in *Lakshmandas Sarupchand* v. *Dasrat* (2), has, I think, no application to the present case. Registration in that case is said to amount to possession and is important as a completion of the title, and in the sense of completion of title it has been held to amount to notice so as to give to the holder of the prior title which is registered validly as against a subsequent purchaser.

Having regard to the terms of s. 53 of the Transfer of Property Act I do not think any such view of the doctrine of notice can apply here, where, if the doctrine be applicable at all, it can only apply for the purpose of either rebutting the presumption of fraud or of preventing the presumption of fraud from arising. In my judgment if the true meaning of s. 53 be that the Court is to presume fraud only in accordance with the facts of each particular case, the facts in this case are amply sufficient to raise the presumption as regards this deed of appointment. I think for these reasons that I am bound to hold that the deed of appointment of 1878 is fraudulent as against the Bank, and that therefore the Bank are entitled to the declaration which they seek to the effect that the deed is void and inoperative as against them.

[205] The result is that there must be the declaration I have indicated, and the usual mortgage decree in favour of the Bank with costs as against all the parties.

From this decision the defendants, Simon Raphael Joshua, Luna Raphael Joshua and Elias Raphael Joshua appealed on the following

(1) L. R. 7 E. and I. Ap. 135.

(2) 6 B. 168.

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grounds: (1) That the Court was in error in declaring that the deed of appointment of 17th December 1878 was fraudulent and void as against the plaintiff Bank; (2) that the Court ought to have found that the said deed was not made with intent to defraud subsequent transferees; (3) that the Court was in error in presuming that the said deed was made with such an intent, and it ought to have found that there was no ground for such a presumption: (4) that the Court was in error in holding that the construction placed on the statute 27 Eliz., c. 4, was applicable to s. 53 of the Transfer of Property Act; (5) that the Court was in error in construing the second clause of s. 53 of the Transfer of Property Act to mean that a deed such as therein referred to must be presumed to be fraudulent unless the contrary be shown; (6) that the Court ought to have held that the effect of the said deed was not to defraud the plaintiff Bank; (7) that the Court ought to have held that the plaintiff Bank had notice of the said deed, and therefore was not defrauded by it; (8) that the Court was in error in holding that s. 53 of the Transfer of Property Act had any application to the said deed; (9) that the Court was in error in holding that the said deed was or embodied a transfer of property, or that any property was conveyed by it; (10) that the Court should have found that the property comprised in the settlement of 15th June 1870, and in respect of which the deed of appointment was made, was personal property, and should have held that neither s. 53 of the Transfer of Property Act, nor the statute 27 Eliz., c. 4, had any application to render the said deed of appointment fraudulent or void.

Mr. *Pugh* and Sir *Griffith Evans*, for the appellants.

Mr. *Phillips*, Mr, *O'Kinealy*, and Mr. *Zorab*, for the respondents.

Sir *Griffith Evans*.—The Court below has held, under s. 53 of the Transfer of Property Act, that the deed of appointment of 1878 must be presumed to be fraudulent and void as against the plaintiff Bank; this was applying the rule laid down with regard [206] to the statute 27 Eliz., c. 4, which was repealed by s. 2 of the Transfer of Property Act, and for which s. 53 of that Act has been substituted. There were two statutes of Elizabeth with regard to voluntary transfers, *viz.*, Eliz., c. 5, making such transfers void as against creditors, under which statute it had to be found whether or not there was a fraudulent intent; and 27 Eliz., c. 4, which avoided voluntary deeds as against subsequent purchasers with or without notice, as to which there was to be a presumption of fraudulent intent. These two statutes were no doubt in force in this country at any rate on the original side of the Court, *i.e.*, in the Presidency towns: *Judah* v. *Abdool Kurreem* (1), and *Abdool Hye* v. *Mohammed Mozaffar Hossein* (2). Both these statutes were repealed by the Transfer of Property Act, and s. 53 of that Act now stands in place of them It is submitted that under that section voluntary transfers are in the same position as they have been placed in England by the recent Voluntary Deeds Act of 1893 (56 and 57 Vict., c. 21), called in the Preamble, "an Act to amend the law relating to the avoidance of voluntary conveyances." Section 3 of that Act does away with the presumption of there being a fraudulent intent. I contend that the effect of s. 53 is that there is now no irrebuttable presumption with regard to voluntary deeds, as regards subsequent purchasers; if it is to be construed as leaving the law in the same position as it was under the two statutes of Elizabeth, the result would be that the same words in s. 53 of

(1) 22 W. R. 60. (2) 10 C. 616=11 I. A. 10.

the Transfer of Property Act, would have to be construed in different ways for the cases of voluntary deeds against creditors (13 Eliz., c. 5), and voluntary deeds against purchasers (27 Eliz., c. 4), and that cannot be the proper construction; the same words must be read in the same way with respect to both classes of deeds. As to the history of the Transfer of Property Bill, see the introduction to Gosvami's edition of the Transfer of Property Act. [NORRIS, J. referred to the note to s. 53 in Whitley Stokes' Anglo Indian Codes, p. 767.] The words of the section as to this are "*may* be presumed," giving a discretion as to drawing **[207]** a presumption of fraudulent intent (see s. 4 of the Evidence Act); the distinction between these words and "shall be presumed" is shown in the Act itself where the latter words are used, as in s. 45. The same distinction appears in the Evidence Act; see s. 105 and s. 114; and in s. 112 of the same Act the words used are, "shall be conclusive proof." It is submitted, therefore, that under s. 53, both as regards creditors and purchasers, the presumption of fraudulent intent is a rebuttable one. That there was not an irrebuttable presumption under 13 Eliz., c. 5, is shown by the notes to *Twyne's case* (1). Under 27 Eliz., c. 4, the presumption was not always considered irrebuttable. In the earlier cases a reasonable construction was put on it: see the judgment of Lord Ellenborough in *Doe d. Otley* v. *Manning* (2). Afterwards the rule as to irrebuttable presumption was laid down, and Judges, though not approving of it, have felt obliged to follow that rule: *Clarke* v. *Wright* (3); *Doe d. Newman* v. *Rusham* (4); *Bayspoole* v. *Collins* (5). In the last case Lord Hatherley, L.C., says that the Court has attempted to remedy the evil results of the rule by holding in some cases that a small consideration is sufficient to support a deed alleged to be voluntary, and in the case of *Clarke* v. *Wright* a marriage settlement in favour of existing children was held not fraudulent under 27 Eliz., c. 4. In the present case we say there was consideration for the deed, *viz.*, natural love and affection, and under s. 25 of the Contract Act, that is a sufficient consideration, provided the deed be registered; and in this case it was registered. The rule as to the irrebuttable presumption under 27 Eliz., c. 4, as laid down in *Doe d. Otley* v. *Manning* (2), and the other cases was, I contend, swept away in England by the statute 56 and 57 Vict., c. 21, to which I have referred, and if that case were to be decided now, the conveyance, there held void although made in consideration of natural love and affection, would now be held to be a valid deed; and it is submitted the law is the same under s. 53 of the Transfer of Property Act. We show consideration, and the registration of the deed prevents any inference being **[208]** drawn that fraud was intended; since the registration system came in a voluntary conveyance is not an apt way of defrauding purchasers. The register if properly searched would have shown the document. Fraud cannot, therefore, be presumed from Mrs. Joshua's secrecy. Registration amounts, in fact, to notice: see *Lakshmandas Sarupchand* v. *Dasrat* (6). We contend, moreover, that here there was an actual trust in favour of the children; that the trust property was vested in the trustee, and the deed therefore irrevocable. *Ellison* v. *Ellison* (7); *Godfrey* v. *Poole* (8). There is enough on the evidence to show that under the

(1) 3 Rep. 80=1 Smith's L. C. 1.
(2) 9 East., 59 (61).
(3) 6 H and N. 849 (870).
(4) 17 Q. B. 724.
(5) L.R. 6 Ch. Ap. 228 (232).
(6) 6 B. 168.
(7) 1 Wh. & Tu. L.C. 291.
(8) 13 L.R. Ap. Cas. 497.

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circumstances the deed was not made with an intent to defraud. *The Aylesford Peerage case* (1) was referred to as to evidence of conduct; and *Abrath* v. *North Eastern Railway Company* (2) as to the change from time to time in a case of the burden of proof.

Mr. *Phillips*, for the respondent.—Under the settlement in 1870 the Municipal debentures were the absolute property of Mrs. Joshua, and not impressed with any trust by her father. By the deed of 1878, Mrs. Joshua did not intend to create an irrevocable trust; she never regarded the property as out of her own power; her trustee under the settlement was a trustee for her only; she was the only *cestui que trust*. She never gave the property away at all in such a way that she could not exercise further power over it. The deed of 1878 was revocable, and the trust could be put an end to by her at any time. [O'KINEALY, J. referred to the case of *Paul* v. *Paul* (3)]. That was a case of an executed trust. Here there is no making over the property until Mrs. Joshua's death; the trustee is in the position of her agent and must be guided by her directions; the deed is in the position of a will which she could revoke at pleasure. It would not be irrevocable even under a delegated power, much less under a self-created power as in this case: Sugden on Powers, 8th Edition, 394. This deed of appointment is not more than a direction to the trustee; a person should not be considered as having parted with property, if no one else has taken any interest in it, and here no one had done so. Brett's Leading Cases in Equity, 16. Mrs. Joshua had no intention of putting **[209]** the property out of her power. [PETHERAM, C. J.—She may nevertheless have done so.] Would the Court enforce the deed against her intention? She did not intend to deprive herself of the power of dealing with the property, and she did not understand the deed to have such an effect: see *Perrott* v. *Perrott* (4). [O'KINEALY, J.—The text books appear to be against such a deed being revocable.] All the cases with regard to revocable trusts are under derived powers, which are distinguishable from this case. The question is, was it her intention to deprive herself of her power over this property? [PETHERAM, C. J.—Can we go further than to say what was her intention as gathered from the document: it was executed by her after advice from her solicitor.] The whole transaction is perfectly consistent with the contention that she did not intend to deprive herself of her power over the property. [O'KINEALY, J.—She never said anything after her husband's death in 1884. To keep the money from her husband, therefore, was not the chief reason for her action in making the appointment.] She would then have disclosed her object, if it had been to benefit her children. No trust was created. *Hughes* v. *Stubbs* (5), *per* Wigram, V. C. There must be an intention to create it. It is for the appellant to prove that she did intend to deprive herself of the power to dispose of the property; the *onus* is not on us to show that she did not intend to so deprive herself. She did not contemplate the creation of a trust. *Gaskell* v. *Gaskell* (6); *Smith* v. *Warde* (7). [PETHARAM, C.J., referred to *Field* v. *Lonsdale* (8)]; *Acton* v. *Woodgate* (9). There was sufficient and ample power in the trustee to create a charge on the property, provided the creator of the trust and the trustee combined, as they did. The respondents are purchasers for value without notice, and they have the legal interest, and challenge the appellants to take it away. The appellants have to show

(1) L..R. 11 Ap. Cas. 1. (2) L.R. 11 Q.B.D. 440 (452). (3) L.R. 20 Ch. D. 742.
(4) 14 East 423. (5) 1 Hare. 476 (479). (6) 2 Y. and J. 502.
(7) 15 Sim. 56. (7) 13 Beav. 78. (9) 2 M. & K. 492

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that their interest (and if they have any they must prove it) is superior to ours. Our position can only be assailed by its being shown that we had notice. Now we had no notice, and we are found by the lower Court to have [210] here acted with due care and diligence, and in good faith ; see *Agra Bank* v. *Barry* (1) and the Transfer of Property Act, s. 41, which incorporates into the Act the doctrine with regard to a *bona fide* purchaser without notice.

To come to s. 53 of the Transfer of Property Act, one set of words is used for the two statutes repealed, 13 Eliz., c. 5, (as to defeating creditors) and 27 Eliz., c. 4 (as to defrauding subsequent transferees), because the words of those statutes were the same. There was nothing in 27 Eliz., c. 4., as to the Court making any presumption. Yet without any words the interpretation put on it was that there was an irrebuttable presumption. By s. 53 of the Transfer of Property Act, power is given to the Court to make the presumption, and the argument of the other side is that that lessens the Court's power to presume ; but why should that be so? Giving the Court power to presume does not limit its power of making the presumption. It was not intended to sweep away all the precautions against secret frauds in this country. Here they are more necessary where nothing is what it appears to be, as *benami* transactions, *wakfs*, &c. It was intended to incorporate the law of England as it was before the Voluntary Deeds Act of 1893, that is, as it is laid down in and in, cases on, 27 Eliz., c. 4. The law has been altered in England, but not here : see the remarks of West, J., in *Rangilbhai Kalyandas* v. *Vinayak Vishnu* (2), and Mr. Stokes' speech in Gosvami's Transfer of Property Act. This case would come within what is laid down in the case of *Judah* v. *Abdool Kurreem* (3), and *Abdool Hye* v. *Mohammed Mozaffar Hossein* (4), and the principle of those cases is equally applicable to Calcutta and to the Mofussil. The statute, 27 Eliz., c. 4, was not thought hard on voluntary settlements by all the Judges, though Cockburn, C.J., thought so. Blackburn, J., did not. The indignation of the Judges (if it existed) was because, even with notice, it defeated the settlement: *Clarke* v. *Wright* (5). Blackburn, J., does not express disapproval of the [211] doctrine as to the irrebuttable presumption, see p. 860 of the report, nor Williams, J., p. 875. Snell's Principles of Equity, 232, as to the conversion of personal property into real property ; and the case of *Powell* v. *London and Provincial Bank* (6), as to the plaintiff Bank being fixed with notice, were referred to.

Mr. *O'Kinealy* on the same side.—Mrs. Joshua had an absolute right to this property :—*Barford* v. *Street* (7), *Irwin* v. *Farrer* (8). Even if under s. 53 of the Transfer of Property Act there is not an irrebuttable presumption, but one which may be taken into consideration, the Court in this case has made the presumption that the deed is fraudulent, which it was entitled to do under s. 4 of the Evidence Act, which explains the words "may presume." There are all the elements to show that the inference of fraud is clear, and there is nothing to disprove it. The presumption to be drawn should be that which the Court would have had to draw under the statute 27 Eliz., c. 4, which, as Mr. Stokes says in his Anglo-Indian Codes, is replaced by s. 53 of the Transfer of Property Act. We made all the search we were bound to do considering that we had the

(1) L.R. 7 E. & I. Ap. 135. (2) 11 B. 666 (671). (3) 22 W. R. 60.
(4) 10 C. 616 (624) = 11 I. A. 10. (5) 6 H. &N. 849.
(6) L. R. (1893) 1 Ch. D. 610 (614). (7) 16 Ves. 135. (8) 19 Ves. 86.

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covenant of the only two persons who could give title that the property was not incumbered and that the title deeds of the property showed no trust. It is the practice to rely on previous searches, as we did here.

Mr. *Pugh* in reply.—The real question is whether the Judge in the Court below was right in presuming fraud; whether there was or not fraud in fact was a question not raised in the Court below, but only the question of presumption of fraud under the statute 27 Eliz., c. 4. Apart from the legal fiction of fraud, there is nothing in this case from which fraud can be presumed. It is impossible to hold on the facts that Mrs. Joshua's intention was to commit fraud. The deed of appointment was intended to leave the property to her children, and was given in trust for their benefit; the legal right to the property was in the trustee, so that *Barford* v. *Street* and *Irwin* v. *Farrer* are distinguishable. Mrs. Joshua transferred all the interest she had by the deed of appointment: see *Nanney* v. *Morgan*(1). There was no power of revocation in her. The settlement of 1870 was not a voluntary settlement. **[212]** On the question of what is the test as to the onus of proof. *Abrath* v. *North Eastern Railway Company* (2) was referred to *per* Bowen, L. J. Reference was also made to *Agra Bank* v. *Barry* (3) as to notice.

Cur. ad. vult.

The judgment of the Court (PETHERAM, C.J., and NORRIS and O'KINEALY, JJ.) was as follows:—

JUDGMENT.

The appellants in this case are the sons of Mr. Joshua against whom a decree was given in the Court below which is now in appeal.

Mrs. Joshua was married in May 1870, and in the following year she received certain Municipal debentures belonging to her father standing in the name of her brother. She then settled this property and appointed Mr. E. S. Gubboy and her brother trustees to hold it for herself for life without anticipation, and afterwards for such persons as she should appoint by deed or will. The debentures were soon after sold, and their proceeds together with Rs. 7,000 which were borrowed in 1872 from the brother of one of her trustees, Mr. Gubboy, were invested in house property in Calcutta. In 1878 Mrs. Joshua desired to release her brother Mr. Elias from his trust, and apparently was anxious to make an appointment in favour of her children, and the way she carried out this arrangement was the only way consistent with keeping the fact of the appointment as much a secret as possible. On the 17th December 1878 two documents were executed. Mr. Elias retired from the trust, and conveyed his interest to the remaining trustee Mr. Gubboy, and Mrs. Joshua made a deed of appointment in favour of her children. The deed of appointment, which was registered after the release of Mr. Elias from his trust and witnessed by him only, was not referred to in the document of title in the hands of the remaining trustee. At the time of the execution of this deed Mrs. Joshua is represented to have told Mr. Gregory, her solicitor, that her husband was a trader, and apparently led him to imagine that she wanted to make a deed of appointment to prevent any pressure from him. At the same time there is nothing on the record of this case which would lead us to believe that her husband was **[213]** ever in needy circumstances, ever pressed her, or died without leaving property.

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(1) L. R. 37 Ch. D. 346. (2) L. R. 11 Q. B. D. 440 (452).
(3) L. R. 7 E. & I. Ap. 135.

Matters remained in this position till the year 1884. In March of that year Mr. Elias became sole trustee in place of Mr. Gubboy, and then he, with the consent and agreement of Mrs. Joshua, borrowed, under a deed of mortgage, the sum of Rs. 6,500 from Mr. Gubboy, her former trustee. This document was signed by Mrs. Joshua and Mr. Elias, and it contains no mention at all of the deed of appointment of 1878, thus plainly indicating that up to that time no change in the title had been made by Mrs. Joshua. Mrs. Joshua's husband died in October 1884, and now follows a period in which, if, as Mrs. Joshua said, she executed the appointment only as a protection from her husband, she should in honesty have made known to her trustee that the time for concealment had passed, and that she had made the appointment. The debt under the mortgage of 1884 remained unpaid until the year 1888, when Mr. Gubboy, at the request of Mr. Elias, the trustee, made an assignment of the mortgage in favour of Sarah Emma Sim and others who, in consideration of such assignment, paid to Mr. Gubboy Rs. 6,500 and to Mr. Elias, the trustee, Rs. 6,500, making a total sum of Rs. 13,000 and on the 25th July the said Sarah Emma Sim and others made a further advance to Mr. Elias of Rs. 12,000. In all Rs. 25,000 were raised on the mortgaged premises. In this transaction, just as in the transaction of 1884, no mention was made of the exercise of the power of appointment, and the title of the property was the same as the title shown in 1884. The mortgage debt of 1888 remaining unpaid, the trustee attempted to raise money from the plaintiffs in this case, and he, and Mrs. Joshua on the 16th October 1890, mortgaged the premises for the sum of Rs. 42,000. In this mortgage deed Mrs. Joshua stated that she had not made any irrevocable appointment in respect of the premises, and, revoking all appointments, if any, heretofore made by her, she exercised the appointment in favour of the Bank.

There can be no doubt that Mrs. Joshua knew the contents of all the documents of 1884, 1888 and 1890, and that she behaved in a very improper manner.

[214] Under s. 53 of the Transfer of Property Act, where a transfer is made gratuitously for a grossly inadequate consideration, the transfer may be presumed to have been made to defraud or defeat creditors. But in addition to that presumption the transaction of 1878 was carried out in a most unusual way, and in the only way in which secrecy could be maintained. The deed of appointment was not given to the trustee, and no notice of it appeared in the title. On the contrary it was kept by the lady herself who was one of the *cestui que* trusts. By this unusual procedure the settlor and the trustee were enabled to raise from time to time large sums of money by inducing the persons who advanced the money to them to believe that the whole title lay in the lady and the trustee. It seems to us, therefore, a fair inference that this unusual procedure was adopted by the lady in 1878 with the intention of enabling herself and the trustee to obtain money by shewing a complete title in themselves and yet to prevent the lenders from realizing their money.

We think, therefore, that the decree of the Court below is correct, and this appeal must be dismissed.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Gregory & Jones.*

Attorneys for the respondents: Messrs. *Dignam, Robinson & Sparkes*; Messrs. *Harriss & Simmons.*

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PRESENT:

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

HEMANTA KUMARI DEBI (*Plaintiff*) *v* JAGADINDRA NATH ROY BAHADUR (*Defendant.*)

HEM CHUNDER CHOWDHRI (*Plaintiff*) *v.* JAGADINDRA NATH ROY BAHADUR (*Defendant.*) [12th June, 1894.]

Enhancement of rent—Independent taluk formerly part of a zemindari—Decree of 1805—*Regulation VIII of* 1793, *ss.* 51 *and* 76—*Bengal Tenancy Act,* 1885, *s.* 67.

A decree of the Sudder Dewani Adalut in 1805 declared that a *taluk* was fit to be separated from the zemindari of which it had originally been part [215] according to the provisions of s. 5, Regulation VIII of 1793. The decree directed that, until separation, rent should be paid by the *talukdar* to the zemindar, "according to the *jumma*, already assessed upon the *taluk*," this revenue to be, on the separation being effected, deducted from that assessed upon the zemindari.

Proceedings with a view to separation then continued, but litigation and delays ensued, with the result that no separation had been effected when these suits were instituted in 1882 and 1885. In these, the holders of shares into which the zemindari had been partitioned claimed to enhance the rent on the *taluk*. *Held*, that the decree of 1805, acted upon for many years, was conclusive; that the *taluk* was not dependent on the zemindari, but an independent one, within s. 5, Reg. VIII of 1793; and that, therefore, the zemindars had no right of enhancement.

Section 67 of the Bengal Tenancy Act, 1885, applies only to rent payable quarterly.

[R., L. B. R. 1893—1900, 606; D., 33 C. 683 = 3 C.L.J. 391; 18 C.L.J. 175 = 17 C. W.N. 820 (822) = 19 Ind. Cas. 625.]

CONSOLIDATED appeals from one judgment and four decrees (25th March 1890) of the High Court, affirming decrees (26th April and 4th June 1888) of the Subordinate Judge of Maimensingh.

These appeals were preferred by the two plaintiffs, now appellants, who held separate shares, one a ten annas, the other a four annas, share, in the zemindari Pakhuria Jainshi in the Maimensingh District. Each sued separately on the 10th July 1881 for enhanced rent, on notice, on a *taluk* named Taraf Balasuti Dejai, on which they, and their predecessors in estate before them, received rent as zemindars from the *talukdar*, the defendant, now respondent. This *taluk* had been granted out of the zemindari before the Permanent Settlement by a former zemindar to whom and his successors the *jumma* assessed on the *taluk* was paid as rent by the predecessors of the present *talukdar*. This having been at first Rs. 9,648 was increased in the Bengali year 1206 (English 1799-1800) to Rs. 16,369-8-11; and this rent was paid after the subsequent partition of the zemindari proportionately to the holders of the shares therein. When these suits were commenced the holder of the ten annas share was Maharani Surat Sunderi Debi, widow of the late Raja Jogendra Narain Roy. She died during the suit, and was now represented by Rani Hemanta Kumari Debi, widow of the son, now deceased, whom she had adopted to her late husband, Jogendra Narain. [216] The decision upon her claim governed the claim of Hem Chunder Chowdhri, who held the four annas share.

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Whether the *jumma* paid on the *taluk* as rent to the zemindar was enhanceable by him, or not, depended on whether the *taluk* was a dependent one, or was independent within the sections of Reg. VIII of 1793 relating to separated *taluks*. But it had first to be decided whether a decree of the Sudder Dewani Adalut in 1805, and subsequent acts of those through whom the parties claimed, had left this an open question.

The facts, in brief, were that Rani Bhabani, holding the zemindari before the Decennial Settlement, granted the *taluk* to her daughter Tara Devi, a grant confirmed by Maharaja Ram Krishna Rai, with whom the settlement was made. The zemindari then passed into another family's possession, but the *taluk* remained with the original one. Disputes arose as to the amount of *jumma* to be paid by the *talukdar*, and in particular the suit was instituted which the Sudder Court finally decided in 1805, *viz.*, *Bhobindur Narain* v. *Bishen Nath Rai* (1). This was brought on the 12th December 1800 by the then *talukdar* Bishen Nath Rai, son of Ram Krishna Rai, ancestor of this respondent, against Bhobindur Narain, complaining that the latter had obtained, under Reg. VII of 1799, an order for payment of rent by the *talukdar* at the rate of Rs. 16,369-8-8 by the year, against the plaintiff's *naib*; that sum being in excess by Rs. 6,720 over his, the plaintiff's liability for rent. He claimed the difference. The defence was that an increase of revenue, by way of four years' *rasad beshi* (progressive increase), had been assessed on the whole zemindari of Pakhuria Jainsahi at the Decennial Settlement, and that the Collector had assessed the proportionate *rasad* upon the *taluk* Balasuti, fixing Rs. 16,369-8-11 as the annual *jumma* for the year 1197 (English 1790-91), so that the order had been duly obtained. The local Courts differed in their opinions as to what the complaining *talukdar* was entitled to receive, but both would have allowed a refund in part. However, the Sudder Court, on the defendant's appeal, gave the judgment which, reversing the decrees below and disallowing any refund, entered into [217] the matter of the separation of the *taluk*, thereby affecting the present state of affairs between those in possession of the rights formerly held by the parties to that suit. The record was stated at the hearing of this appeal to be no longer forthcoming, but the judgment of the Sudder Court appears in their order of the 14th August 1805, of which the exact words are given in the judgment of the High Court of the 25th March 1890 (2).

The basis of Maharani Surat Sunderi's claim was that the *taluk* had been created since the Permanent Settlement and was a dependent one within the meaning of s. 51, Reg. VIII of 1793; and that this gave her a claim in accordance therewith and in virtue of s. 14 of the Landlord and Tenant Act (Bengal Act VIII of 1869) to the enhanced rent of Rs. 68,559.

The defendant's answer was that the *taluk* was not a dependent one, and that the rights which he possessed in it were equal to those which the plaintiff held in the zemindari. Hem Chunder Chowdhri's claim in reference to his share was Rs. 4,365-3-4 under the same enactments. The defence to both the claims of the zemindars was that the *taluk* was independent, as a portion of Pargunna Pakhuria, bearing a proportionate sudder *jumma*, or revenue, payable to Government, without there being any right, either by custom or in any way, to enhance the amount which had been paid to the zemindars.

(1) 1 Sel. Rep. 100=6 I. D.(O. S.) 100.

(2) 22 C. 216, *supra*.

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The Subordinate Judge, on the 6th April 1888, dismissed both the claims to enhance the rates of rent; but the rent in arrear, at the old rates claimed at the same time, he decreed. He was of opinion that the decree of the Sudder Court of the 14th August 1805 was conclusive, and that the defendant was a *talukdar* with proprietary right within s. 5, Reg. VIII of 1793, and did not hold the *taluk* as a subordinate tenure. On the 4th June 1888, on the same grounds, he dismissed the two other suits, which the same plaintiffs commenced in 1885 and 1886 to obtain enhanced rates of rent for the years 1289 to 1292.

Appeals by the plaintiffs in all the four suits were taken up [218] together and dismissed by a Division Bench of the High Court (O'KINEALY and CHUNDER MADHUB GHOSE, JJ.).

Their judgment gave a history of the *taluk* and a statement of the early litigation about the rent of it. They based their decision mainly on the judgment of the Sudder Court of the 14th August 1805, which they considered to be conclusive on the right of the *talukdar* to have separation. Having stated the proceedings that led to the appeal to that Court, they continued thus:—

In this state of the case, and upon the facts before them, the Sudder Dewani decided that the *talukdar* had not a *mokurari istemrari* interest in the land, that, in fact, these words did not occur in the deeds of sale in favour of Rani Tara, nor had the grantee paid the same *jumma* from twelve years prior to the Decennial Settlement. They then say: "For these reasons it is finally decreed and ordered that the decree of the Judges of the Provincial Court, date d the 22nd March 1804, be set aside, and that of the District Judge, dated the 12th December 1801, allowing the *jumma* of Rs. 13,452-11-18 *gundas*, be modified, and the claim of the respondent for the excess *jumma* of Rs. 6,720-14-11 *gundas* be disallowed and dismissed; that the amount which, by execution of those two decrees, has been awarded to the respondent from the appellant, be refunded to the appellant by the respondent with interest at the rate of Re. 1 per cent. per month. As Doyaram Chuckerbutty, the *naib* of respondent, executed, on 20th January 1796, in the presence of the Judge of Maimensingh, in favour of the appellants, an *ikrarnama* to the effect that the respondent had objection to the (payment) of *rasud*, &c., in the *jumma* of Rs. 16,369-8-11, for which reason he has made an appeal, therefore he (the executant) would pay to him, during the pendency of the appeal, the rent according to the above mentioned *jumma*. In order to avoid dispute and trouble and costs of the parties, it seems proper that on account of the past years and the present year as well as of the years to come, till separation of the respondent's *taluk* from the zemindari of the appellants, the respondent should pay rent to the appellant according to the aforesaid *jumma*. But as this is a suit simply on account of the excess *jumma* of 1206 B.S., therefore it is not proper to pass any order in the decision of this suit with respect to the payment of the balance of the aforesaid *jumma*. From the deeds of sale and documents filed by the respondent, *taluk* Balasudi and others, the property of the respondent, is fit to be separated from the zemindari of the appellant according to the provisions of s. 5, Reg. VIII of 1793. The respondent has, within the time prescribed by s. 14, Reg. I of 1801, filed a petition for the separation before the Collector of the district; therefore it is necessary that according to the order of the Collector of 2nd Magh 1208 B. S., the respondent do file before the Collector all the documents relating to his *taluk* with a copy of this decision, so that the [219] said Collector do in future deduct, according to the

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provisions of s. 10, Reg. I of 1793 and s. 8 of Reg. I of 1801, the sudder *jumma* of the *taluk* of the respondent from the sudder *jumma* of the zemindari of the appellants, and separate the *taluk* of the respondent from the zemindari of the appellants."

The order of the Sudder Court concluded by providing for costs.

Petitions for separation followed, and orders were made by the Collector. On the 30th December 1808 the Board of Revenue, referring to the Sudder Court's decree, wrote that the *talukdar* was entitled to have his *taluk* separated from the entire estate of Pakhuria, the *jumma* allotted on it to bear the same proportion to its actual produce as the *jumma* of the entire estate bore to the produce of the latter, and that until this could be ascertained the *talukdar* was to pay to the zemindar an annual *jumma* of Rs. 16,369-8-11.

The judgment of the High Court, after referring to numerous other proceedings and causes of delay, summed up that there could be no doubt that the Sudder Court had declared the *talukdar* entitled to separation, being an independent *talukdar*, and in equally express terms had declared that until separation the *talukdar* should pay the above *jumma*. The Sudder Court had jurisdiction thus to declare. The High Court concluded its judgment in the words set forth in their Lordships' judgment.

On this appeal,—

Mr. *R. B. Finlay*, Q. C., and Mr. *C. W. Arathoon* argued that the rent could be enhanced, the *taluk* being one subordinate to the zemindari, and never effectually separated from it. They referred to the repeated commencement of proceedings to effect the separation, and argued that the steps necessary to complete it had never been taken. The intention hardly was to have a separate *taluk* in the early stages, as nothing had been done at the Decennial or Permanent Settlement to have the separation effected at a time when it would have been readily carried out. The appellants were not concluded by the statements in the order of the Sudder Court of the 14th August 1805. The question of the independence of the *taluk* had not been contested on what might be taken as a direct issue of a sufficiently definite kind raised **[220]** between the parties, and the most that the decree had decided was that at that time the *talukdar* might, on proper steps being taken by him for the purpose, have a separation carried out. It was contended that in the long course of proceedings no separation had been effected, and the *taluk* had remained a dependent one.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne*, for the respondent, were not called upon as to the question of the right to enhance the rent.

JUDGMENT.

Their Lordships' judgment was given by

LORD MACNAGHTEN.—The appellants are the zemindars of a ten-anna and a four-anna share in the zemindari property called Pakhuria Jainsahi, in the District of Maimensingh. The respondent is *talukdar* of a *taluk* called Balasuti, forming part of that zemindari. The object of the four suits, which were brought by the predecessor in title of Rani Hemanta Kumari Debi and by Hem Chunder Chowdhri against the respondent, was to obtain from him enhanced rents in respect of that *taluk*. The main question to be decided in these appeals is whether the Courts below were right in holding that the appellants were precluded by a decree of the Sudder Dewani Adalut from demanding a larger rent from the respondent than Rs. 16,369-8-11, or from disputing the

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independent nature of the respondent's *taluk*. The decree of the Sudder Court was pronounced on the 14th August 1805. By that decree the Court expressed the opinion that the then defendant, the predecessor in title of the respondent, was entitled to have his *taluk* detached from the plaintiff's zemindari, and that in the meantime, and until separation took place, the rent of sicca Rs. 16,369-8-11 should continue to be paid.

The sole objection to treating that decree as absolutely binding comes to a question of form. It is said that the opinion of the Sudder Court was expressed in the form of a recommendation and not in the form of a decision. That undoubtedly is so; but it was an expression of opinion by a Court which was perfectly competent to deal with the matter, and it must be borne in mind that at that time the pleadings, if there were any pleadings, were not very strict or very formal. Beyond that, it appears that from the date of the decree until the present question arose, both [221] parties, zemindars and *talukdars* alike, have treated that expression of opinion as binding.

Proceedings were taken soon after the decree to obtain an actual separation. Those proceedings lasted for about fifty years. They were carried on with more or less activity, until the year 1854 when they came to an end, not in consequence of the right of the predecessor in title of the respondent to a separation being disputed, but because of the intervention of the Government.

The first of the four suits now pending was brought in the year 1882. Both Courts have decided the suits in the respondent's favour. In the judgment of the High Court pronounced in all the suits the view of the Court is expressed as follows: "The suit, as laid, is a suit against an independent *talukdar* alleged to be a dependent *talukdar* under the Regulations; and it appears to us quite clear from the decision of the Sudder Dewani Adalut that it was decided between the parties that, instead of being a dependent *taluk*, it was an independent *taluk*, within the meaning of s. 5, Reg. VIII of 1793, and that that decision had been acted upon by both parties for nearly fifty years." In that view their Lordships entirely concur. They are of opinion that there is no foundation whatever for these appeals on the main question of the enhancement of rent.

A subordinate question arose in Appeals Nos. 20 and 21 of 1890 with regard to the interest on the rent in arrear. It appears that there are some arrears which have become due since the Bengal Tenancy Act, 1885. The Subordinate Court held that interest was to be calculated monthly on the arrears; but the High Court held that under the provisions of that Act, as regards arrears which became due after the Act came into force, the interest should be calculated quarterly. It appears to their Lordships that the High Court were wrong, and that the provision in s. 67 of the Act, on which they relied, only applies to cases where the rent is payable quarterly. Here it is not disputed that the rent is payable monthly, and on rent in arrear it appears to their Lordships that interest ought to be calculated monthly. This is a matter which has not added at all, or if at [222] all, only to an infinitesimal degree, to the costs of the appeals, and their Lordships think that this variation ought to make no difference as to the costs.

Although by the judgment of the High Court the judgment of the Subordinate Court was varied in the above respect, the decrees drawn up by the High Court contain no such variation, but simply dismiss the appeals from the Subordinate Court with costs. The decrees of the

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High Court are consequently right and should be affirmed. Their Lordships will humbly advise Her Majesty accordingly. The appellants must pay the costs of these appeals.

Appeals dismissed.

Solicitors for the two appellants, Rani Hemanta Kumari Debi and Hem Chunder Chowdhri: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

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PRIVY COUNCIL.

PRESENT:

The Earl of Selborne, Lords Watson, Hobhouse, Macnaghten, Morris and Shand and Sir R. Couch.

[Appeal from the Chief Court of the Punjab.]

GURDYAL SINGH (*Defendant*) v. RAJA OF FARIDKOT (*Plaintiff*).
[29th June and 28th July, 1894.]

Foreign Court, judgment of—Suits in British Courts on judgments and decrees of Courts established in recognized Foreign States—Territorial jurisdiction of each separate State in personal actions—Civil Procedure Code (Act XIV of 1882), ss. 431, 434.

Jurisdiction, being properly territorial and attaching, with certain restrictions, upon every person permanently or temporarily resident within the territory, does not follow a foreigner, after his withdrawal thence, living in another State.

As to land within the territory jurisdiction always exists, and may exist over moveables within it; and exists in questions of *status*, or succession governed by domicile. But no territorial legislation can give jurisdiction, which a Court of a Foreign State ought to recognise, over an absent foreigner owing no allegiance to the State so legislating.

In a personal action, to which none of the above causes of jurisdiction apply, a decree pronounced by a Court of a Foreign State *in absentem*, the latter not having submitted himself to its authority, is by international law a nullity.

Not to the Courts of the State in which the cause of action has arisen [223] nor in cases of contract to those of the *locus solutionis*, should resort be had by the plaintiff, but to the Courts of the State in which the defendant resides, the Courts of the latter State having jurisdiction in all personal actions.

Ex parte decrees for money were made in the territories of the ruling Chief of Faridkot, a State in subordinate alliance with the Government of India, against a person who had been employed by the State within its territories but had before suit brought relinquished his employment, had left the State, and was then, at the time when he was sued, resident in another State of which he was the domiciled subject: *Held*, that these decrees were a nullity by international law, and could not receive effect in a British Indian Court.

Becquet v. *Macarthy* (1) distinguished. The judgment of Blackburn, J., in *Schibsby* v. *Westenholaz* (2) referred to and explained.

There is no ground for supposing, as did one of the Courts below (3) that no suit will lie upon the judgment of a recognized Foreign Indian State.

[F., 26 C. 931 (936) = 3 C.W.N. 614; 20 M. 112 (115, 116) = 7 M.L.J. 76; **Rel. on,** 75 P. R. 1909 = 144 P.L.R. 1909 = 92 P.W.R. 1909 = 3 Ind. Cas. 528; **R.,** 19 A. 450 (452) = 17 A. W. N. 98; 20 B. 133 (142); 24 B. 86 (89); 25 B. 528; 25 C. 641 (645, 649) = 5 C. W. N. 741; 29 C. 509 (516); 18 M. 327 (330); 29 M. 239, Note

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(1) 2 B. & Ad. 951.
(2) L.R. 6 Q.B. 155 (161).
(3) Following *Bhawani Shankar* v. *Parsadri Kalidas*, 6 B. 292.

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(280); 1 Ind. Cas. 965 = 3 S.L.R. 45 (49); 2 L. B. R. 47 (49); 34 P. R. 1898; 14 M.L.T. 96 = (1913) M. W. N. 605 (607) = 20 Ind. Cas. 704 (706); **Cons. and Expl.**, 29 M. 239 (269) = 16 M L.J. 238 = 1 M.L.T. 71; **Not F.**, 18 Ind. Cas. 189 (194) = 24 M.L.J. 619 (628); **D.**, 32 M. 469 = 3 Ind. Cas. 190 = 19 M.L.J. 459.]

TWO consolidated appeals from a judgment (3rd March 1888 and 24th July 1888) of the Chief Court and two decrees thereon, which reversed two decrees (29th August 1882) of the Additional Commissioner of the Lahore Division, affirming two decrees (24th February 1882) of the Judicial Assistant Commissioner, Lahore District.

The principal question on this appeal was whether the decrees of a Court in the recognized Foreign State of Faridkot had been made with competent jurisdiction over the defendant. The cause of action was alleged to have arisen against him in that State, but he was not a subject of it, nor resident within it, when the suits in Faridkot were brought on which the foreign decrees were made. On the answer to this depended the further question whether the latter were recognizable foreign judgments upon which the District Court of Lahore could decree the present suits which were instituted by the plaintiff in order that effect might be given to the foreign decrees against the defendant, who had engaged in trade in Lahore and was subject to the jurisdiction of the Lahore District Courts. The Chief Court maintaining that jurisdiction had been competently exercised in Faridkot differed from the Courts in the District and Division of Lahore.

[224] Faridkot, one of the Cis-Sutlej States under the superintendence of the Punjab Government, is one of the Indian States in subordinate alliance with the Government of India, termed in the judgment of the Chief Court "protected, dependent States," and of this State the ruling Chief or Rajah was His Highness Bikrama Singh, respondent in this appeal. The Chiefs of Faridkot had, under the engagements entered into with them by the British Government after the conquest of the Punjab, the right of legislating for the internal affairs of the State including the establishment of Courts of Justice; rights in that respect before possessed by those Chiefs being recognized and confirmed—Aitchison's Treaties, Engagements and Sanads, Vol. VI, edition of 1876, p. 59. The first article of the *sanad* to Faridkot of 1863 confirmed and guaranteed to the Raja all the powers and authority, civil and criminal, then exercised by him.

This *sanad*, according to the note upon it (1), resembled those granted in the same year to the Maharaja of Patiala, and to the Rajas of Jhind and Nabha, differing from them, however, in conferring no new right, or privileges, but only confirming those which the Rajas of Faridkot had before exercised. As regarded the autonomy in internal administration possessed by the Chiefs of Faridkot there was no difference of opinion in the Courts below in deciding the present case, all treating it as a recognised Foreign State. The ruling Raja had introduced into Faridkot a procedure resembling in principle that of British India, and had appointed Judges to try causes. Of these Gunga Pershad was the principal, having jurisdiction to try suits of any value; and another Judge, Gauhar Singh, had, until special authority was given to him by the present Raja to try the suits instituted by him against the appellant's father, a jurisdiction limited to suits of the value of Rs. 1,000.

The defendant, now appellant, was a native of Jhind, and had been employed by Wazir Singh, Raja of Faridkot, father of the present Raja, to keep the State accounts and to act as *Bakshi* (paymaster). In this

(1) Aitchison—"Treaties, Engagements and Sanads," Vol. VI.

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capacity the defendant resided in Faridkot from the month of Pous, Sambat 1926 (1869) to the 10th Baisakh, Sambat [225] 1931 (1874). Having left his employment he left the State in the same year. In that year also Raja Wazir Singh died. Against Bir Singh were then alleged defalcations in the money under his charge. Between the State and Bir Singh ensued a correspondence, conducted by *mukhtars* on the part of the former, represented by the succeeding Raja, Bikrama Singh, on the subject of the accounts. In 1875 the Raja filed a suit against Bir Singh and two subordinates employed in the office under him, claiming Rs. 6,61,664, with other sums, for interest and costs, on "Treasury Book Account," in the Court of Gaubar Singh, who had powers enlarged by the Raja for the trial of this suit, and another, which was then filed against Bir Singh by the Raja in the same Court. In this the claim was for Rs. 18,324 for money alleged to have been misappropriated and spent by Bir Singh, partly in the purchase of property at Lahore. Service of summons was attempted, unsuccessfully at first, through the Jhind authorities on Bir Singh, then living in Jhind territory. Afterwards a summons was sent through the Commissioners of the Amballa Division, acting through the Tehsildar of Pipli. Bir Singh did not appear, nor take any apparent notice of the summons. The first suit was decreed on the 8th November 1879 for Rs. 67,282, and the other on the 25th January 1880 for Rs. 18,041.

On these two foreign decrees, alleged to have been duly made in the State of Faridkot, the two suits, out of which the present appeal arose, were filed on the 12th November 1881 in the Court of the Judicial Assistant Commissioner, Lahore District. In September 1887 Bir Singh died, and his son Sirdar Gurdyal Singh came on to the record of the appeal then pending in the Chief Court in his father's place. The only issues, of the several that were fixed, now material, as referring to matters that were the subject of contention on this appeal, were first an issue which questioned whether the two decrees, on which the plaintiff's suits were brought, had been made against Bir Singh in the rightful exercise of a jurisdiction over him, and either over his person or in respect of the subject-matter of the suit; secondly, an issue as to whether the judgments of the Foreign Court were, or were not, contrary to natural justice, and had or had not been obtained by fraud; and, thirdly, as to whether the proceedings had [226] taken place with or without legal notice to Bir Singh to appear.

The Judicial Assistant Commissioner, Lahore District (Mr. E. W. Parker) recorded that there was no dispute that the plaintiff was the ruler of a recognised Foreign State. For the meaning of that term he referred to 33 and 34 Vic., cap. 90, s 30; and as to "foreign judgment" to the Civil Procedure Code, ss. 2 and 13, expl. 6. In his opinion s. 431, Civil Procedure Code, related only to questions of State as between States being excluded, but did not affect the cognizance of the Court's foreign judgments on civil rights. Nor had s. 434 any operation to prevent adjudication upon a foreign judgment by the British Indian Courts. The present suits were based on legal obligations created by the two foreign judgments against the defendant who was subject to the local jurisdiction of the Lahore Courts; and it was for the latter to examine whether the Faridkot Court had rightly exercised jurisdiction over him. The ground of jurisdiction claimed to have existed in that Court over the defendant was that, although he was not resident in the State of Faridkot when sued, he had, by taking service with that State, impliedly submitted to the jurisdiction of its Courts in matters relating to his official duties and in all

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cases of action against him arising out of that service. The answer to this, however, was that there was no evidence of any submission which had extended the period of his liability to be sued in Faridkot beyond the period of his residence there. The right of the Faridkot Court to exercise jurisdiction beyond the boundaries of the State depended on the rules of private international law, and not on any rule of procedure enacted by that State, or adopted by it, in practice. Bir Singh, when sued, was not a subject of the Faridkot State, nor was he domiciled nor resident within its territories, nor had he property there which was itself the subject of suit. The *sanads* and treaties between that State and British India did not recognize any exercise of jurisdiction over non-resident persons. The suits in question were not instituted until three years or more had elapsed after the defendant had left Faridkot, without intention of returning. He had also avoided any submission to the Faridkot Courts. In the Assistant Commissioner's opinion the fact of the cause of [227] action, whether no contract or on tort, having arisen within the local jurisdiction of the latter, would not be sufficient to empower them to adjudicate in a suit against him, he not being a subject of that State, nor any longer a resident in its territory. Reference was made to the observations of Lord Blackburn in *Schibsby* v. *Westenholz* (1), and the point was considered, with the result that the decision was thus expressed: " Judged by the general law governing the subject of foreign judgments, and treating Faridkot as a foreign country, the present judgments must fail on the ground of want of jurisdiction on the part of the Faridkot Court over the person of the defendant Bir Singh, no submission to the jurisdiction being made out."

An appeal from this decision was dismissed by the first appellate Court, the Additional Commissioner of Lahore. He concurred in the opinion of the Assistant Commissioner on the question of the jurisdiction of the Faridkot Courts. But he followed the decision of the Bombay High Court in *Bhawani Shankar* v. *Parsadri Kalidas* (2) as to the construction of the sections of the Civil Procedure Code relating to foreign judgments.

The Chief Court (PLOWDEN and BURNEY, JJ.) on the plaintiff's appeal reversed the decrees of the Courts below on the question of the jurisdiction of the Court in Faridkot, and decreed the plaintiff's claim in both suits. The Judges gave judgment on the general question of the authority of the Court in Faridkot and the jurisdiction exercised over Bir Singh; and gave a second judgment on the questions of fact raised by the second and third of the above-mentioned points in dispute. It was within the powers of the Chief Court, as the Judges held, to decide the latter question on a second appeal, in consequence of the legislation of Act XVIII of 1884 amending the course of appeal.

The principal grounds of the first judgment of the Chief Court may be summarized as follows:—

That although Faridkot was a protected dependent State, yet the *sanad* of 1863, which had been granted to its ruler by the British Government, confirmed to him and his male heirs all the rights and authority, civil and criminal, formerly exercised by the [228] Chief. The protectorate, on the one side, and this dependence, on the other, did not prevent the State of Faridkot from having all such attributes of independent States as were compatible with the conditions of protection and dependence. As

(1) L.R. 6 Q.B. 155. (2) 6 B. 292.

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to the position of such a State, Phillimore's International Law, paras. 75 and 76, and Twiss' International Law were referred to. Some of the rights of an independent State would be extinguished, or suspended, by the very fact of the subjection and dependence of the State, and limitations might be imposed by the paramount power; but, unless lost or modified, the right of jurisdiction, one of the rights incident to independence, would belong to the recognized State. Here that right had not been extinguished. That right had been discussed by Story, Conflict of Laws, para. 18, showing that a State "might regulate the mode of administering justice in all cases calling on its tribunals to protect, vindicate and secure the wholesome agency of its own laws within its own dominions." To the same effect were other writers on International Law. It followed that the Foreign Court in Faridkot was in this respect on an equal footing with that of any independent State. It could prescribe its own rules of civil jurisdiction and procedure, adopting, as the Raja had done, the civil procedure, in many of its provisions, that had been enacted for British India. Also that State could make provision for issuing process or summons to defendants who had gone away, and were out of the territorial jurisdiction to which they had previously been subject, and that State had power to act in the mode that prevailed in British India, and in European Countries, in regard to matters in suit in its Courts; also, that the Faridkot Court, which had issued the decrees in question, was a "Foreign Court" within the second section of the Code of Civil Procedure, and that the Raja was competent to sue in British Courts.

The senior Judge then gave his opinion in these words:—

"As to s. 431, which deals with the competency of a Foreign State to sue, I doubt whether the present suit is one falling within the scope of that section. It might be so if the plaintiff was suing as head of the State for money due to the public treasury of the State, but this is at least doubtful. But if the suit can be so regarded, I entertain no doubt that the subject of this suit is to enforce rights of the head of the State which are private within the meaning of the section.

[229] "I concur with the learned Chief Justice of Bengal that the section deals with those private rights of the State which must be enforced in a Court of Justice as distinguished form its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another; [*Hajon Manick* v. *Bur Singh* (1); *Cf.*, Westlake, s. 135, and Foote's Private International Jurisprudence, pp. 87 to 92.]

"Having dealt with the preliminary objections, it will be most convenient if I state at the outset my findings on the other controverted points, at least so far as they are the grounds of decision in the lower Courts, dealing with each in detail afterwards.

"I. In the first place, then, I consider that a foreign judgment may constitute a cause of action in a Court in British India, and that the judgments of Courts of native States in India do not form any exception to the general rule.

"II. In the next place, I hold that it may be pleaded in our Courts as a defence to a suit on a foreign judgment that the Court which made it was not a Court of competent jurisdiction. I find that it is not proved that the Foreign Court in this case was not a Court of competent jurisdiction. I consider that according to the laws of the

(1) 11 C. 17 (24).

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Faridkot State, the Faridkot Court had jurisdiction over the defendant, and the subject-matter of the cause, and that the Judge's authority to hear and pronounce judgment in the cause did not expire before the judgment was pronounced.

"III. I further hold that, according to the law to be administered in our own Courts, the Foreign Court was a Court competent to try the case and pronounce the judgment, notwithstanding the defendant was not a subject of or resident in the State, or present when the proceedings commenced, because the obligation, in respect of which the foreign judgment was pronounced, was one contracted by the defendant during his residence in the State, and intended to be there fulfilled.

"IV. I further hold that it may be a good defence in our Courts in an action on a foreign judgment that the defendant had no opportunity to defend himself in the Foreign Court, and no notice sufficient to give him such opportunity, as required by the principles of natural justice ; but I find that the defendant had such notice, and did not avail himself of it.

"V. I further hold that it may be well pleaded to an action in our Courts upon a foreign judgment pronounced on the merits, that it is, upon its face, founded upon an inaccurate view of the law of British India, or of international law, or that it is contrary to natural justice, or has been obtained by fraud, but not that the judgment is erroneous upon the merits of the questions decided.

"As to the first branch of the first proposition, namely, that a foreign **[230]** judgment may be a good cause of action in the Courts of British India, it is not necessary to say much. I do not understand it to have been questioned by the counsel for the defendant, or seriously disputed by the Commissioner in his judgment, or by Mr. Justice Melvill in the Bombay case relied upon.

"It has long been established in England, as well as in America and other countries, that an action may be founded upon a foreign judgment, and suits of this nature have also been recognised in India. They were recognised some sixty years ago in the Courts of the Mofussil by the Sudder Dewani Adalat of Bengal which regarded suits upon decrees of the Supreme Court as suits upon foreign judgments. *Zumeeroodeen* v. *Ram Mohun Mullik* (1); *Nobin Kishen Huldar* v. *Bissumber Seil* (2); *Takoi Sheraab* v. *Mukeethur Vardoon* (3).

"In Morley's Digest, Volume I, p. 504, are two instances of suits on judgments in the Supreme Court in 1776 and 1778, and the note indicates that such actions were not infrequent in 1850 (Title, "Practice," No. 62 and Note). The Sudder Dewani Adalat, Bengal, in construction No. 1,133, and in the case noted at p. 389 of Morley's Digest, Volume I, (as No. 242, Title, "Jurisdiction"), regarded foreign judgments as enforceable by action.

"The like view has been taken by the High Court of Calcutta.

"Suits brought upon judgment of the French Court at Chandernagore [*Boloram Gooy* v. *Kameenee Dossee* (4) ; *Heeramonee Dossee* v. *Promotho Nath Ghose* (5) ; and *Sreehuree Bukshee* v. *Gopal Chunder Samant* (6)] have been treated by the High Courts as maintainable, and the English law as to such suits applied.

"In *Sreehuree Bukshee* v. *Gopal Chunder Samant* (6) it appears not to have been doubted that if the Recorder had jurisdiction over the

(1) 3 Sel. Rep. 111. (2) 6 Sel. Rep. 187. (3) 7 Sel. Rep. 547.
(4) 4 W. R. 107. (5) 8 W.R. 32. (6) 15 W.R. 500.

defendant, an action brought on a judgment of the Court of Queen's Bench would lie. An instance of such a suit in the Mofussil of Bombay is to be found in *Sakharam Dikshit* v. *Ganesh Sathe* (1). The same doctrine is well established in Madras, the cases being collected in the judgment (which will again be referred to) in *Sama Rayar* v. *Annamalai Chetti* (2).

" It has also been recognised by this Court in respect of a judgment of a Court of the Faridkot State in case No. 4 of Punjab record, 1874, in which, though the judgment is short, the question of the remedy of the plaintiff was fully argued on both sides to my personal knowledge as a counsel in the case.

" Lastly, the Limiation Act, 1877, in art. 117 of sch. II, expressly contemplates suits upon foreign judgments."

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[231] The senior Judge was of opinion that as " it was certain that whenever a question arises of enforcing the obligations arising out of a contract, the law to be applied is the *lex loci contractus*, that furnishes a strong argument in favour of the binding effect of the judgment of a tribunal *loci contractus*, over an absent foreigner who has contracted while resident in the country where such tribunal is situate ;" and that such tribunal retained its jurisdiction over the absent foreigner in respect of the particular contract.

As to the contention that the defendant had not received notice of the suit, he held that the finding of the Court below, which was conclusive on a question of fact, was that he had notice, and that it was not open to him now to contend that such notice was not legal, and that it was clear that the defendant never had any intention of defending the suit.

As to the issue regarding the contravention of natural justice and fraud, the third of the issues above stated, it was observed that, though there had been a certain disparagement of the judgments of the Faridkot Court in the lower appellate Court, the matters of injustice or fraud had not been pressed by the defendant in that Court.

In reference to the judgment of the Chief Court, it should be explained that after its delivery the defendant's counsel pressed for a hearing in the Chief Court of the issue as to fraud. The right to such a hearing being conceded, the question arose with reference to the legislation of Act XVIII of 1884, as to how a remand could be made. For the reasons above mentioned, and no objection being made by either party, an order was made, on the 21st May 1888, that the case be retained in the Chief Court and heard there on this issue as it would be heard in a Court of first appeal.

It was, accordingly, so heard, and the final judgment of the Chief Court was delivered on the 24th July 1888.

No further evidence in support of the allegation of fraud was adduced by the defendant, on which the Court could rely. The contentions were that there had been fraud in the obtaining of the judgments in that Gauhar Singh had no jurisdiction under the *perwana* from the Raja giving him increased powers as a Judge, and that the Raja had, in fact, interfered with the course of the **[232]** trial of the suits; also that he kept back certain State accounts which he ought to have produced before the Commissioners deputed by the Faridkot Court to examine the accounts.

Both the Judges concurred in judgments of the 24th July 1888, in finding that the defendant had failed to show any fraud on the part of the plaintiff; and, as the result, a final decree was made setting aside the

(1) 3 B. 193. (2) 7 M. 164.

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orders of the lower Court, and giving decrees for the amount claimed in both suits.

On this appeal,—

Mr *A. R. Jelf*, Q.C., and Mr. *J. H. A. Branson*, for the appellant, contended, as the main point, that there was error in the decision of the Chief Court in maintaining the jurisdiction attempted to be exercised by the Faridkot Court over Bir Singh when he was in Jhind territory. There were points raised on other issues, on the finding for instance, which, they submitted, was an imperfect finding, that there had been effective service of summons on Bir Singh, and also on the issue as to the alleged contravention of justice in the proceedings. As to the latter, it was contended that injustice might have resulted to Bir Singh from the relative positions of the Raja, the Judge, and his own position. But the principal argument was that the Court in Faridkot had no jurisdiction, in reference to the rules of international law, to decree a personal claim for money against any one, who, not being a subject of that State, was not resident in its territories, but resided in those of another of which he was a subject, and had not submitted in any way to the Court's jurisdiction. The defendant's wrongful acts or omissions might have supported a decree against him, if proved, while he was still a resident in Faridkot, but could not after he had left the State, as he had left it in 1874 without intention to return. When these suits were instituted he was amenable to another jurisdiction. No law made by the Faridkot State by analogy to the sections in the British Indian Code, which distributed business internally, for districts and provinces under one Government, could render Bir Singh subject to the decrees of the Faridkot Court made against him in his absence, and without his submission, after he had left the territory. This was no matter for the authority of Faridkot to ordain, or any other State, but was a matter of **[233]** international private law. In 1875, when Bir Singh was resident in Jhind territory, Faridkot was no longer, for the purposes of the Raja's suit against him, the *forum rei*, which, according to the general law of Europe, the "*actor*" must follow. The "*reus*" could not be sued in the country which he had abandoned, and to which he owed no allegiance. Regarding the jurisdiction of the Lahore District Court, as soon as it was shown that Bir Singh had been made a defendant in the Faridkot Court at a time when he was no longer a resident in that State, it was thrown upon the plaintiff to establish in what way that Court could be legally entitled to exercise coercive power as a tribunal over him. This had not been established; and, therefore, the British Indian Court could not enforce the decrees of the Foreign Court as if they had been validly made. Therefore, the decision of the Courts below the Chief Court should not have been reversed. Whether contrary to natural justice, or in accordance with it, the decrees could not hold if made, as it was contended they had been, without jurisdiction; but referring again to the former, the circumstances of the case, including the absence of Bir Singh, were such that the decrees were contrary to justice. It was an absolute nullity to give a person notice to attend on a day on a proceeding which was past before that day; and this had apparently occurred here.

They referred to the following in the course of their argument :—

Westlake's "Private International Law," Edn. 1890, p, 206; Foote's "Private International Jurisprudence, 2nd Edn., p. 560; *The Charkieh* (1);

(1) L.R. 4 A. & E. 59.

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Godard v. *Gray* (1); *Schibsby* v. *Westenholz* (2); *Mathappa Chetti* v. *Chellappa Chetti* (3); *Duchess of Kingston's case* (4); *Price* v. *Dewhurst* (5); *Bank of Australasia* v. *Nias* (6); *Ferguson* v. *Mahon* (7); *Rousillon* v. *Rousillon* (8).

Mr. R. B. Finlay, Q. C., *Mr. R. V. Doyne, and Mr. W. H. Rattigan*, for the respondent.—The Chief Court had heard the case [234] on the issue as to whether the judgments of the Foreign Court were contrary to natural justice (in other words whether they contravened any general principle to which the Courts administering justice always require adherence), and also whether they had been obtained by fraud. The decision had been that there was no such contravention and no fraud. Also, on the question, now again revived, whether the defendant had received notice of the suits against him, it had been clearly established that he had notice, and he even admitted the fact. But he preferred not to appear. In connection with this were cited *Vadala* v. *Lawes* (9), and *Abouloff* v. *Oppenheimer* (10). On the main question of jurisdiction over Bir Singh by the Faridkot Court when he was in Jhind territory, that Court, doubtless, had jurisdiction over him, so long as he was resident in Faridkot territory, and it was argued that the Court retained that jurisdiction after he had withdrawn himself from that territory. The larger of the two suits related entirely to the accounts which Bir Singh ought to have rendered. When he became a responsible officer of the State he virtually held himself to be within the jurisdiction of the Faridkot Court, inasmuch as he had, in effect, agreed to account to the State, and to be liable in case of his not doing so. Office having been thus accepted, and the whole cause of action having arisen in the State of Faridkot, where the breach had taken place, to obey the law of that State was obligatory upon him. Part of that law declared that a suit should be brought where the whole cause of action had arisen, a procedure adopted from that prevailing in British India. On this, when notice had been given to Bir Singh, and the suits duly heard, though in his absence, the decrees were well founded. The main point for enquiry was whether the circumstances of the case were such as to make it right that the jurisdiction of the foreign Court should be upheld and enforced. In British India, the Court in which the principal should sue his defaulting accountant would be that within whose jurisdiction the whole cause of action accrued. The English law showed that where there was a contract made and broken within the English Court's jurisdiction, there might be service of notice outside it, as recognized by the form prescribed in the Judicature Acts. Reference was made to Phillimore's [235] International Law, Edn. 18, Vol. 4, p. 75. By the Roman law such an exercise of jurisdiction would be borne out, and that law should be referred to, not as giving by its own force the rule of international law of the present day, but as affording that guide which had been followed generally in the European States in these matters of jurisdiction. The application of the maxim "*Actor sequitur forum rei*" was not disregarded by holding that the Faridkot Court had jurisdiction over a defendant in Jhind territory, that Court belonging to the State within whose territories the complete cause of action had accrued. The *forum* had not been changed by his withdrawal from the territory. The presence of the "*reus*" was wanted: that, it was true, brought up his place of residence. With notice to him,

(1) L.R. 6 Q.B. 139. (2) L.R. 6 Q.B. 155. (3) 1 M. 196.
(4) 2 Smith. L.C. 871. (5) 8 Sim. 279.
(6) 16 Q.B. 717=20 L.J. Q.B. 292. (7) 11 Adol. & El. 179.
(8) L.R. 14 Ch. D. 351 (371). (9) L. R. 25 Q. B. D. 310.
(10) L.R. 10 Q.B.D. 295.

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or citation, effected, the place where he had failed to discharge his obligation was the place where a suit against him might be brought. The learned counsel referred to the Digest Lib. V., Tit. 1. s. 19, as showing instances where the defendant, though out of the local jurisdiction, could be sued: "*Si quis tutelam, vel curam, vel negotia, vel argentariam, vel quid aliud unde obligatio oritur, certo loco administravit, et si ibi domicilium non habuit, ibi se defendere debebit. Si non defendat, neque ibi domicilium habeat, bona possideri patietur.*" The judgment of Holloway, J.. in *Mathappa Chetti* v. *Chellappa Chetti* (1), was that the fact of the contract having been made within the jurisdiction of a Foreign Court did not necessarily render that Court competent. But the seizure of goods was a means of compelling attendance; and if a person had held office, and obligation had thence arisen, to this, by the Roman law, he was liable. The *locus solutionis* was, in some cases, the place where the suit should be brought. "*Contraxisse unusquisque in eo loco intelligitur in quo, ut solveret, se obligavit.* Digest Lib.. IV, Tit. 4, s. 7. The plaintiff was allowed the option of suing not only in the local jurisdiction within which the "*reus*" might be, but, also, in cases of contract of suing where that contract had been made and broken. Westlake's Private International Law, pp. 205, 208. Savigny, ss. 241, 244, 271. Also were cited *Hewetson* v. *Fabre* (2), *Becquet* v. *Macarthy* (3), *Don* v. *Lippman* (4), *Becquet* **[236]** v. *Macarthy* was a case where an action was brought in Mauritius against a person who had already gone to the Cape of Good Hope. [Lord Selborne remarked that there the person sued was holding office at the time in Mauritius; here Bir Singh had ceased to hold office in Faridkot.] But here, although the defendant had ceased to hold office in that State, he was still connected with it by the effect of his previous relations with it. He had assets which he had left in the State; some of his pay remaining unpaid.

They referred to *Williams* v. *Jones* (5) cited by Blackburn, J., in *Schibsby* v. *Westonholz* (6), *Godard* v. *Gray* (7), *Rousillon* v. *Rousillon* (8), *Kaliyuyam* v. *Chokalinga Pillai* (9), *Sama Rayar* v. *Annamalai Chetti* (10). It had been rightly held that the foreign judgments were cognizable in the absence of any proof of fraud, or violation of natural justice, by the District Court at Lahore.

Counsel for the appellant were not called upon to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD SELBORNE.—The respondent, the Raja of Faridkot, obtained in the Civil Court of that Native State in 1879 and 1880, two *ex parte* judgments in two suits instituted by him against the appellant, for sums amounting together to Rs. 76,474-11-3 and costs. For all the purposes of the question to be now decided, those two suits may be treated as one, the appeals to Her Majesty in Council having been consolidated. Two actions, founded on these judgments, were brought by the Raja against the appellant in the Court of the Assistant Commissioner of Lahore and were dismissed by that Court, on the ground that the judgments were pronounced by the Faridkot Court without jurisdiction as against the appellant. On appeal to the Additional Commissioner of Lahore, the

(1) 1 M. 196. (2) L. R.. 21 Q. B.D. 6. (3) 1 B. and Ad. 959.
(4) 5 Cl. and Fin. 1. (5) 9 M. and W. 819. (6) 6 Q. B. 155.
(7) L.R. 6 Q.B. 137. (8) L. R. 14 Ch. D. 351. (9) 7 M. 105.
(10) 7 M. 164.

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judgments of the first Court were upheld. The Raja then appealed to the Chief Court of the Punjab, which differed from both those tribunals and upheld the jurisdiction of the Faridkot Court.

[237] Faridkot is a Native State, the Raja of which has been recognized by Her Majesty as having an independent civil, criminal, and fiscal jurisdiction. The judgments of its Courts are, and ought to be, regarded in Her Majesty's Courts of British India as foreign judgments. The Additional Commissioner of Lahore thought that no action could be brought in Her Majesty's Courts upon a judgment of a Native State, but in this opinion their Lordships do not concur.

The appellant was for five years, beginning in 1869, in the service of the late Raja of Faridkot as his treasurer, and the causes of action, on which the suits in the Faridkot Court were brought, arose within that State, and out of that employment of the appellant by the late Raja. The claim made in each of the suits was merely personal, for money alleged to be due, or recoverable in the nature of damages, from the appellant. It is immaterial, in their Lordships' view, to the question of jurisdiction (which is the only question to be now decided), whether the case, as stated, ought to be regarded as one of contract, or of tort.

The appellant left the late Raja's service, and ceased to reside within his territorial jurisdiction, in 1874. He was, from that time, generally resident in another independent Native State, that of Jhind, of which he was a native subject, and in which he was domiciled ; and he never returned to Faridkot after he left it in 1874. He was in Jhind when he was served with certain processes of the Faridkot Court, as to which it is unnecessary for their Lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them, and never appeared in either of the suits instituted by the Raja, or otherwise submitted himself to that jurisdiction.

He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him.

Under these circumstances, there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit (" *Actor sequitur forum rei*"), which is rightly stated. by Sir Robert Phillimore (International Law, **[238]** Vol. 4, s. 891) to " lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and " *extra territorium jus dicenti, impune non paretur.*" Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it ; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory ; and, in questions of *status* or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction ; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a Foreign Court, to the

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jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorised by special local legislation) in the country of the *forum* by which it was pronounced.

These are doctrines laid down by all the leading authorities on International Law; among others, by Story (Conflict of Laws, 2nd edition, sections 546, 549, 553, 554, 556, 586), and by Chancellor Kent (Commentaries, Vol I, p. 284, note (c) 10th edition), and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

[239] The conclusion of the learned Judges in the Chief Court of the Punjab is expressed in the following sentence of the judgment delivered by Sir Meredyth Plowden in the first of the two actions :—

" On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there, is not acting in contravention of the general practice or the principles of International Law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority of any relevancy was cited at their Lordships' bar to support it, except *Becquet* v. *Macarthy* (1), and a passage from the judgment delivered by Blackburn, J., in *Schibsby* v. *Westenholz* (2).

Of *Becquet* v. *Macarthy*, it was said by great authority in *Don* v. *Lippman* (3) that it " had been supposed to go to the verge of the law;" and it was explained (as their Lordships think correctly) on the ground that " the defendant held a public office in the very colony in which he was originally sued." He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the Colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a Colonial Government, it would, in their Lordships' opinion, have been wrongly decided, and it is evident that Lord Justice Fry in *Rousillon* v. *Rousillon* (4) took that view.

The words of Lord Blackburn's judgment, in *Schibsby* v. *Westenholz*, which were relied upon, are these :—

[240] "If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them, though, before finally deciding this, we should like to hear the question argued."

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(1) 2 B. and. Ad. 951.
(2) L.R. 6 Q. B. 155.
(3) 5 Cl. and F. 1.
(4) L.R. 14 Ch. D. 351.

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Upon this sentence it is to be observed that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever *forum* the remedy might be sought. The learned Judge had not to consider whether it was a legitimate consequence from this that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them, in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court, and if this was what Mr. Justice Blackburn meant, their Lordships could not regard any mere inclination of opinion on a question of such large and general importance, on which the Judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight, which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsby* v. *Westenholz*, Mr. Justice Blackburn had at the trial formed a different opinion from that at which he ultimately arrived, and their Lordships do not doubt that if he had heard argument upon the question, whether an obligation to accept the *forum loci contractus*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion that such obligation, unless expressed, could not be implied.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the Chief Court of the Punjab, and to restore those of the Additional Commissioner of Lahore. The [241] respondent will pay the costs of the appeals to the Courts below, and of these appeals.

Appeal allowed.

Solicitors for the appellant: Messrs. *Lattey & Payne.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

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22 C. 241.

CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Sale.

FARKAN AND OTHERS (*Petitioners*) *v.* SOMSHER MAHOMED AND ANOTHER (*Opposite Parties*)* [24th October, 1894.]

Judgment—Form and contents of judgment—Criminal appeal, judgment in—Criminal Procedure Code, 1882, *ss.* 367, 424.

A Deputy Commissioner, after hearing an appeal from a Deputy Magistrate who had convicted the appellants of rioting, gave the following judgment:—

"After hearing the arguments of the pleader for the appellants and examining the record I am of the opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe. Appeal dismissed."

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* Criminal Revision No. 558 of 1894, against the order passed by B. B. Newbold, Esq., Deputy Commissioner of Sylhet, dated the 4th September 1894, confirming the order passed by Babu G. C. Nag, Sub-Deputy Magistrate of Sunamgunge, dated the 21st August 1894.

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Held, that this was not a judgment within the meaning of ss. 367 and 424, of the Criminal Procedure Code, and that the appeal must be re-heard.

Kamruddin Dai v. *Sonatun Mandal* (1), and *In the matter of the petition of Ram Das Maghi* (2), followed.

[R., 19 A. 506 (F. B); 13 Cr. L.J. 559 (562)=15 Ind. Cas. 975=8 N.L.R. 84; D., 1 C.W.N. 169.]

THE facts of this case were as follows :—

The accused were charged with rioting under s. 147 of the Penal Code, the occurrence having taken place on the 6th Assar (19th June). The case for the prosecution was that the two complainants and another had come to the south bank of the river Jalia with a herd of cattle to feed them; that the accused with others to the number of 60 or 70 men came in a body armed with *lathis* and other weapons for the purpose of turning the complainants off the [242] land by force; that the latter being afraid crossed the river in their boat to the north bank in order to get away from the accused, but that they were followed by them there and assaulted.

The accused pleaded not guilty, the substantial portion of their defence being that on the day of the occurrence a number of cattle belonging to the Jalia village, to which the complainants belonged, and which were on the north bank of the river, had crossed the river on to the southern bank and strayed on to the land of one Korai; that he and two others went there to seize the cattle and take them to the pound; and that when the accused had taken the cattle across the river on the way to the pound the people of Jalia came out in a body and assaulted them and rescued the cattle.

There was also a cross-case between the parties. The Sub-Deputy Magistrate went fully into the facts and evidence in the case, and believing the case for the prosecution convicted the accused and sentenced them to four month's rigorous imprisonment. The accused then appealed to the Deputy Commissioner who upheld the conviction. The following was his judgment delivered on the 4th September 1894 :—

"After hearing the arguments of the pleader for the appellant and examining the record I am of the opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe. Appeal dismissed."

The accused then moved the High Court, and a rule was issued to show cause why the judgment and order of the 4th September should not be set aside and the appeal re-heard, the ground being that it did not comply with the provisions of ss. 367 and 424 of the Code of Criminal Procedure. The rule came on to be heard.

Mr. *A. C. Banerjee*, for the petitioners in support of the rule.

No one appeared to show cause.

The judgment of the High Court (BANERJEE and SALE, JJ.) was as follows :—

JUDGMENT.

This is a rule calling upon the Deputy Commissioner of Sylhet to show cause why his order dated 4th September 1894 [243] should not be set aside and the appeal re-heard. The ground upon which we have been asked to interfere in this case is that the order complained of which is the judgment of the Deputy Commissioner on appeal from a judgment of the Deputy Magistrate does not comply with the requirements

(1) 11 C. 449.

(2) 13 C. 110.

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of s. 367 read with s. 424 of the Code of Criminal Procedure. The judgment is an extremely short one. It is in these terms: "After hearing the arguments of the pleaders for the appellants and examining the record, I am of opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe." It does not, as s. 367, which is made applicable to appellate judgments by s. 424, requires, contain the point or points for determination, nor any explicit statement of the reasons for the decision on such point or points. It is argued by the learned counsel for the petitioners that one of the questions that arises in the case is whether there was any common object by which the persons who are said to have composed the unlawful assembly were animated, and it is of importance in such cases always to see what the common object is in order to determine whether it is one of the objects which would make the assembly unlawful. Judgments very similar to the one now under revision have been considered by this Court to be insufficient under the law, and retrials have been ordered. [See the cases of *Kamrudin Dai* v. *Sonatun Mandal* (1), and *In the matter of the petition of Ram Das Maghi* (2).] No doubt s. 537 of the Code of Criminal Procedure provides that no finding or sentence of a Court of competent jurisdiction shall be reversed on appeal or revision on account of any error, omission or irregularity in the judgment, unless such error, omission or irregularity has occasioned a failure of justice; but it is impossible to say that the error, omission or irregularity in the judgment in this case has not occasioned a failure of justice, when we do not know what finding the lower appellate Court would have arrived at upon the evidence with regard to the question of common object of the members of the unlawful assembly, and whether, if its attention had been directed to the determination of this question, it would **[244]** or would not have found that there was a common object such as converted the assembly in this case into an unlawful assembly. Where the law allows an appeal, the appellant is entitled to have an explicit opinion from the Court of appeal that has to deal with them on the questions of fact involved in the case. The case seems to us to be exactly similar to the two cases referred to above, and, following those two cases, we make the rule absolute, set aside the judgment of the appellate Court and direct the appeal to be re-heard.

H. T. H. *Rule made absolute and judgment set aside.*

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(1) 11 C. 449. (2) 13 C. 110.

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APPELLATE CIVIL.

22 C. 244.

22 C. 244.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

KARMI KHAN (*Defendant*) *v.* BROJO NATH DAS (*Plaintiff*).*
[17th May, 1894].

Bengal Tenancy Act (VIII of 1885), chap. X, ss. 101, 102—*Power of Revenue Officer —Decision of Special Judge*—Res judicata—*Question whether land is* mal *or* lakhiraj—*Limitation—Sale for arrears of revenue—Act XI of* 1859, *ss.* 37, 53—*Encumbrance—Adverse possession.*

The plaintiff had been proprietor of an estate which was sold for arrears of Government revenue and repurchased from the then purchaser by the plaintiff in 1886. He applied under chap. X of the Bengal Tenancy Act for the measurement of the estate and the preparation of a record of rights, and the Revenue Officer deputed for these purposes found that a portion of the estate held by the defendant was *mal* land, though it was held as *lakhiraj* under certain *sanads* and as he also found that no rent had ever been paid for it, it was entered on the record of rights as *mal* land held under those *sanads* as *lakhiraj*. The Special-Judge on appeal by the plaintiff held that the land having been found to be *mal* should have been entered as *mal* land unassessed with rent. In a suit to have the land assessed with rent, it was found that the *sanads*, under which the defendant claimed to hold, were granted not by any predecessor in title of the plaintiff, and were of a date anterior to the Permanent Settlement: *Held* (reversing the decision of the lower appellate Court) that the Special Judge had no jurisdiction to determine whether the land was *mal* or *lakhiraj*, and that his judgment as to its being *mal* did not therefore operate as *res judicata*. *Secretary of State for India* v. *Nitye Singh* (1) referred to; *Gokhül Sahu* v. *Jodu Nundun Roy* (2) distinguished.

[245] *Held*, also, that the adverse possession set up by the defendant was, within the meaning of s. 53 of Act XI of 1859, an incumbrance subject to which the plaintiff, as a proprietor whose estate had been sold, took it on repurchase. If such adverse possession therefore were sufficiently long the suit would be barred by limitation. The plaintiff could not be regarded as a person who had acquired the estate "free from all incumbrances which may have been imposed upon it after settlement," as provided by s. 37 of Act XI of 1859, and could not therefore claim (as held by the lower appellate Court) that his suit was not barred, having been brought within twelve years from the date of the sale for arrears of revenue.

The case was remanded for findings whether the land was *mal* or *lakhiraj*, and whether the defendant's adverse possession was long enough to bar the suit.

[**F.**, 25 C. 167 (172); **R.**, 14 C. L. J. 136 (141) = 11 Ind. Cas. 453 (456); 12 C. W. N. 528 (529); 23 Ind. Cas. 119; **D.**, 13 C. W. N. 407 = 1 Ind. Cas. 81.]

THE facts of this case are sufficiently stated in the judgment appealed from which was as follows :—

"This appeal arises out of a suit for assessment of rent on 16 *khatas* 5 *chattaks* of land, and also for recovery of the rent for the year 1295 and 1296 and a portion of the year 1297. The plaintiff was one of the proprietors of the estate in which the land sought to be assessed with rent is situated. The estate was sold in 1885 for arrears of Government revenue and purchased by one Prosonno Kumar Shamant, and the plaintiff repurchased it from Prosonno Kumar Shamant in 1886. He applied under chap. X of the Bengal Tenancy Act for the measurement of the *mehal*

* Appeal from Appellate Decree No. 523 of 1892, against the decree of Babu Rabi Chandra Ganguli, Subordinate Judge of Midnapore, dated the 22nd of January 1892, reversing the decree of Babu Ram Jadab Tolapatro, Munsif of Tamlukh, dated 30th of March 1891.

(1) 21 C. 38. (2) 17 C. 721.

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and the preparation of a record of rights, and a Revenue Officer was deputed to make the measurement and prepare the record of rights. The land to which the suit relates was found by the Revenue Officer to form the slope of an old embankment and as such to be *mal* land. But as no rent, it was found, was ever paid for it, it was entered as *mal* land held by the defendant as *lakhiraj* under colour of certain *sanads*. The plaintiff appealed to the Special Judge, who held that the land being found to be *mal* land should be shown as *mal* land unassessed with any rent. The land being found to be *mal* land the plaintiff has brought the present suit to have it assessed with rent. The defence is that the land is a portion of the defendant's *lakhiraj*; that no rent was ever paid for it; that Prosonno Kumar Shamant was merely a *benamidar* for the plaintiff; and that the suit is barred by limitation.

"The learned Munsif in the Court below is of opinion that the Revenue Officer appointed to prepare a record of rights had no power to determine the question whether the land was *mal* or *lakhiraj* and that his finding is not at any rate conclusive on the point. He has accordingly re-opened and tried the question whether the land is *mal* or *lakhiraj* and being of opinion that it is the defendant's valid *lakhiraj* land he has dismissed the plaintiff's suit.

"The plaintiff has appealed. The points for determination in this appeal are:—

[246] "1. Is the suit barred by limitation?

"2. Is the land *mal* or *lakhiraj*, and is it liable to be assessed with rent?

"3. What may be the fair rent payable for it?

"The question whether the land *is mal* or *lakhiraj* land was raised before the officer deputed to prepare a record of rights. He tried that question and found that it was *mal* land forming the slope of an embankment. But as there was no evidence to show that the defendant ever paid rent for it, he chose to enter it as land held by the defendant as *lakhiraj*. In appeal the Special Judge was of opinion that it should be shown as *mal* land unassessed with any rent. The question whether the land is *mal* or *lakhiraj* has therefore been finally set at rest, and the first Court had no jurisdiction to re-open that question [see *Gokul Sahu* v. *Jodu Nundan Roy* (1).] The defendant is admittedly the holder of some *lakhiraj* lands. The land to which the present suit relates is not his *lakhiraj* land, but he seems to have encroached upon it and held it without payment of any rent for a number of years. However this may be, the decision of the Special Judge on the point is final and operates as *res judicata* in the present suit. The land is found to be *mal* land, and it is liable to be assessed with rent.

"The estate was sold for arrears of Government revenue and purchased by Prosonno Kumar Shamant. The plaintiff, who was one of the proprietors before the revenue sale, has repurchased it from Prosonno Kumar Shamant. It is contended that Prosonno Kumar was merely a *benamidar* for the plaintiff; but of this there is no sufficient evidence. It was indeed held in a suit by Bishamvar Jana and others against Prosonno Kumar Shamant and others, to set aside the revenue sale, that Prosonno Kumar was a *benamidar* for Brojo Nath Das; but that suit was dismissed on other grounds, and therefore the finding in it that Prosonno Kumar was merely a *benamidar* for Brojo Nath Das is not conclusive

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evidence on the point. The plaintiff has purchased the *mehal* from the purchaser at a sale for arrears of revenue, and this suit brought within twelve years from the revenue sale is not barred by limitation.

"The Revenue Officer who prepared a record of rights found the rate of rent payable for this kind of land to be Rs. 5 *per bigha*. The defendent does not contest the rate of rent claimed. At the rate of Rs. 5 *per bigha* the rent payable for 16 *khatas* 5 *chattaks* of land is Rs. 4 1-8- a year, exclusive of cesses. The rent assessed on the land is Rs. 4-1-8 a year. I see no reason why one-half of the fair rent should be assessed on the land. The defendant may have held it for a number of years without paying any rent for it. But it is in evidence that before the revenue sale he was for about twenty years the *darputnidar* and *ijaradar* of the *mehal*, and the land is not invalid *lakhirai* resumed. It forms the part of the slope of an embankment, and there is reason to think he encroached upon it and held it without **[247]** payment of rent on the false pretence that it was a part and parcel of his *lakhiraj*. The full rent should be assessed on it.

"The appeal is allowed, the decision of the first Court reversed, and the plaintiff's suit is decreed with costs in both the Courts."

From this decision the defendant appealed on the grounds that the Special Judge had no jurisdiction to try the question whether the land was *mal* or *lakhiraj*, and his decision on that question was consequently not *res judicata*, as held by the lower appellate Court; that as the defendant claimed to hold the land as *lakhiraj* under *sanads* granted to his predecessors before the Permanent Settlement, the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1) was not applicable; that as the Special Judge found that the defendant never paid rent in respect of the disputed land, the finding substantially amounted to finding that the land was *lakhiraj*; that the finding that the tenure was *mal* on the ground that it is the slope of an embankment was merely conjectural and unsustainable in law, and that there was no evidence to show that the defendant ever paid rent for it, or that it was the *mal* land of the plaintiff; that the lower appellate Court was in error in throwing upon the defendant the *onus* of showing the land to be *lakhiraj*; that the finding that the defendant had encroached on the plaintiff's *mal* land was one not based on any evidence; that Prosonno Kumar was merely a *benamidar* for the plaintiff, and as the plaintiff himself was the defaulting proprietor, the lower appellate Court ought to have held that he had not by his purchase acquired the rights of the auction-purchaser, and that his suit was therefore barred by limitation.

Babu *Lal Mohan Das*, and Moulvie *Mahomed Habibullah*, for the appellant.

Babu *Srinath Das*, Babu *Tarak Nath Palit* and Babu *Bidhu Bhusan Ganguli*, for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

This was a suit for assessment of rent. The facts which led up to it are thus clearly stated in the judgment of the Subordinate Judge; "The plaintiff-appellant was one of the proprietors of **[248]** the estate in which the land sought to be assessed to rent is situated. The estate was in 1885 sold for arrears of Government revenue and purchased by one Prosonno Kumar Shamant and the plaintiff repurchased it from Prosonno

(1) 17 C. 721.

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Kumar Shamant in 1886. He applied under Chap. X of the Bengal Tenancy Act for the measurement of the *mehal* and the preparation of a record of rights, and a Revenue Officer was deputed to make the measurement and prepare a record of rights. The land to which the suit relates was found by the Revenue Officer to form the slope of an old embankment and as such to be *mal* land. But as no rent, it was found, was ever paid for it, it was entered as *mal* land held by the defendant as *lakhiraj* under colour of certain *sanads*. The plaintiff appealed to the Special Judge, who held that the land being found to be *mal* land should be shewn as *mal* land unassessed with any rent. The land being found to be *mal* land, the plaintiff has brought the present suit to have it assessed with rent."

The defence to this action is that the land is *lakhiraj*, and that the claim is barred by the law of limitation.

The Court of first instance dismissed the suit, being of opinion that the defendant is entitled to hold the land as valid *lakhiraj*.

On appeal, the Subordinate Judge is of opinion that the judgment of the Special Judge in the proceeding under Chap. X of the Bengal Tenancy Act operates by way of *res judicata*, as regards the question whether the land is *mal* or *lakhiraj*; and in support of this view he quotes a decision of this Court, *Gokhul Sahu* v. *Jodu Nundun Roy* (1). The Subordinate Judge has further expressed an opinion to the effect that the defendant, who is the holder of other *lakhiraj* lands in the village, encroached upon the land, and held it without payment of any rent for a number of years; and upon the question of limitation, he has held that the suit having been brought within 12 years from the date of the revenue sale is within time; and then addressing himself to the question of assessment of rent, he has found that the defendant is liable to pay at the rate of Rs. 5 *per bigha*.

The question whether a Revenue Officer, acting under Chap. **[249]** X of the Bengal Tenancy Act, has authority to determine the question as to the validity of an alleged *lakhiraj* title has been fully considered in a recent Full Bench case of this Court [*The Secretary of State for India* v. *Nitye Singh* (2)]; and it has been held that, in preparing a record of rights under s. 102 of the Bengal Tenancy Act, a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands, and to declare them liable to settlement of rent. No doubt, as explained in some of the judgments delivered in that case, the Revenue Officer, in preparing a record of rights, has to determine, when such a question is raised, whether a person holding land within the area under inquiry is a tenant or not within the meaning of s. 3, cl (3) of the Act; but that is a very different thing from determining whether the land is valid *lakhiraj* or not. In the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1) quoted by the Subordinate Judge, the defendant claimed under a *sanad* granted by a predecessor of the then zemindar, and of a date subsequent to the Decennial Settlement; and he was therefore regarded as a tenant within the meaning of the Bengal Tenancy Act. And this Court therefore held that the Revenue Officer had jurisdiction to enter the particulars of the land in his record of rights. But that is not the case here. The defendant in this case sets up a *sanad* from a person, who is apparently not a predecessor of the plaintiff, and it is of a date anterior to the Decennial Settlement, and he could not therefore be rightly regarded as a tenant within

(1) 17 C. 721.

(2) 21 C. 38.

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the meaning of the Tenancy Act, unless it be that at some time or other he or his predecessor has either attorned to the zemindar or paid him rent. The Revenue Officer was of opinion that no rent had ever been paid for the land; he did not find that the defendant was a tenant of the land; but for certain reasons held that the land was *mal* and not *lakhiraj*, a determination which he was not competent to make.

In this view of the matter, the judgment of the Special Judge cannot operate by way of *res judicata* in the present case.

Then upon the question of limitation that has been raised in this [250] case, the Court below is of opinion, as already mentioned, that the defendant has encroached upon the land and held it as part of his other *lakhiraj* lands without any payment of rent for a number of years. He does not, however, find what may be the exact period for which he (the defendant) has thus held the lands; but he is of opinion that the suit having been brought within 12 years from the date of the revenue sale is not barred by limitation.

The plaintiff, as found by the Subordinate Judge, was one of the proprietors of the estate, and has since the revenue sale repurchased it from the auction-purchaser.

Section 53 of the Revenue Sale Law (Act XI of 1859) runs thus: "Excepting sharers in estates under *butwarra* who may have saved their shares from sale under ss. 32 and 84, Reg. XIX of 1814, and sharers with whom the Collector under ss. 10 and 11 of this Act has opened separate accounts, any recorded or unrecorded proprietor or co-partner, who may purchase the estate of which he is proprietor or co-partner, or who by repurchase or otherwise may recover possession of the said estate, after it has been sold for arrears under this Act, and likewise any purchaser of an estate sold for arrears or demands other than those accruing upon itself, shall by such purchase acquire the estate subject to all its incumbrances existing at the time of sale, and shall not acquire any rights in respect to under-tenants or ryots which were not possessed by the previous proprietor at the time of the sale of the said estate."

The plaintiff, having recovered the estate by repurchase, has acquired it "subject to all its incumbrances existing at the time of sale;" and could not therefore be regarded as a person who has acquired the estate "free from all incumbrances which may have been imposed upon it after the time of settlement," as provided by s. 37 of the Act.

If the plaintiff were entitled to avoid the incumbrances existing at the time of sale, and if his right to resume or assess the land first accrued to him on the date of the revenue sale, then no doubt, as held by the Subordinate Judge, he would be entitled, under arts. 121 and 130 of the second schedule of the Limitation Act, to bring his suit within 12 years of the revenue sale. [251] But under s. 53 of the Sale Law, he is bound by the incumbrances existing at the time of sale; and if the right, which the defendant claims, as having been created in him by adverse possession against the old proprietors (the plaintiff inclusive) and by reason of their laches, is an incumbrance within the meaning of s. 53 of the Revenue Sale Law, it is obvious that the plaintiff would be barred by limitation (whether this suit be regarded as one for avoiding an incumbrance, or for resumption or assessment of the land), if the defendant has had adverse possession for more than 12 years.

The question, what may be the character of the right thus created in a person by adverse possession against the sold-out proprietor, was on several occasions considered by this Court, as also by the late Sudder

Court; and it has always been regarded as an *incumbrance*, which a purchaser at a revenue sale, acquiring rights under s. 37 of Act XI of 1859 (or under the older sale laws repealed by that Act), is entitled to set aside. *Thakoordass Roy Chowdhry* v. *Nubeen Kishen Ghose* (1), *Goluckmonee Dossee* v. *Huro Chunder Ghose* (2), *Narain Chunder* v. *Tayler* (3), *Khantomoni Dasi* v. *Bijoy Chand Mahatab* (4) [as regards a patni sale], *Lukhmeer Khan* v. *Collector of Rajshaye* (5), and *Ramsunker Roy* v. *Bejoy Govind Bural* (6).

We take it therefore that the right claimed by the defendant by adverse possession is an "incumbrance" within the meaning of the Revenue Sale Law.

The defendant might have, as the Subordinate Judge finds, encroached upon the land, and included it within his other *lakhiraj* lands, but this would be no less an adverse possession on his part; for the other lands being not the *mal* lands of the zemindar, he could not be acquiring this land for the benefit of the zemindar, but for his own benefit.

If, however, it is shown that the defendant or his predecessors in title at some time or other after the Permanent Settlement either attorned to the zemindar, or paid him rent, the relation of [252] landlord and tenant would be established, and it might then be well presumed that that relation has continued to exist, unless it be proved that the defendant had, more than 12 years antecedent to suit, set up to the knowledge of the zemindar an adverse right to hold the land as *lakhiraj*, and has been holding it as such during that period. If, again, it is shown that the land had been held as part of the *mal* estate within the last 12 years, before it was taken possession of by the defendant, the suit would be equally within time.

We have already said that the judgment of the Revenue Court does not operate as *res judicata*. The Subordinate Judge has not found, as he ought to have found in this case, whether the land is *mal* or *lakhiraj*, and his decision upon the question of limitation is wrong or otherwise defective.

We therefore think it necessary to remand the case to the lower appellate Court for retrial with reference to the remarks we have made. Costs to abide the result.

J. V. W. *Appeal allowed and case remanded.*

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(1) 15 W.R. 552. (2) 8 W.R. 62. (3) 4 C. 103.
(4) 19 C. 787. (5) S.D.A. (1851) 116. (6) S.D.A. (1852) 824.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

SATCOWRI GHOSH MONDAL (*Plaintiff*) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (*Defendants*).*
[17th May, 1894.]

Fishery. Right of—Right of fishery in tidal navigable river—Right of Government in navigable rivers and fishery therein—Grant by Government of right to private individuals.

As regards this side of India the bed a of tidal navigable river is vested in the Crown; and the right of fishery in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property subject to the right of navigation and such other rights as the public has in such rivers—*Doe d. Seebkristo* v. *East India Co.* (1); *Gureeb Hossein Chowdhree* v. *Lamb* (2); *Bagram* v. *Collector of Bhulloa* (3); *Chunder Jaleah* v. *Ram Churn* [253] *Mookerjee* (4); *Baban Mayacha* v. *Nagu Shravucha* (5); *Prosunno Coomar Sircar* v. *Ram Coomar Paroee* (6); and *Hori Das Mal* v. *Mahomed Jaki* (7) referred to.

Value as evidence of the *thakbust* map, in such a case, discussed.—*Syam Lal Sahu* v. *Luchman Chowdhry* (8); and *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (9) referred to.

[F., 13 C.L.J. 293 (297)=15 C.W.N. 706=7 Ind. Cas. 849 (852); R., 30 C. 291 (P.C.)=7 C.W.N. 193=5 Bom. L. R. 1=30 I. A. 44=8 Sar P.C.J. 412; 39 C. 53 (57); 15 C.W.N. 972=11 Ind. Cas. 130; 13 C.L.J. 625 (631)=6 Ind. Cas. 392; 10 C. W.N. 835; 12 C.W.N. 273=7 C.L.J. 414=3 M.L.T. 212.]

THE plaintiff in this case was *se-putnidar* of *mehal* Dhoba contained in *towji* No. 1 in the Collectorate of *zillah* Burdwan. The suit was brought for possession of a portion of the river Khari which runs by the side of the *mehal*, the plaintiff alleging that the portion of the river in dispute formed part of his *mehal*. He also set up a title derived by adverse possession during twelve years. He stated that he became owner of the *mehal* on 15th August 1881 by right of his purchase of it at an auction sale, and that he had since then held possession of it, until the Collector, on behalf of the Government, made an *ijara* settlement of it with the second defendant, a *karmachari* of the third defendant. The plaintiff also stated that his predecessor in estate held possession of the *jalkar* as part of the *mehal*.

The first defendant (the Secretary of State) claimed the right to the bed of the river and to the *jalkar*, and denied that the plaintiff or his predecessors ever had them. He disputed the plaintiff's title by adverse possession, and contended that the river being deep and navigable was the property of Government. The second defendant supported the pleas set up by the Secretary of State, and alleged that the third defendant had no interest in the matter. The third defendant alleged that he had no interest in the dispute, and asked for costs as having been unnecessarily made a defendant.

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* Appeal from Appellate Decree No. 95 of 1893 against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of Burdwan, dated the 9th of December 1892, reversing the decree of Babu Jadupati Banerjee, Munsif of Kulna, dated 28th of March 1892.

(1) 6 M.I.A. 267. (2) S.D.A. (1859) 1357. (3) Gap. No. W.R. (1864), 243.
(4) 15 W.R. 212. (5) 2 B. 19. (6) 4 C. 53.
(7) 11 C. 434. (8) 15 C. 353. (9) 16 C. 186.

The Munsif found that the river was a tidal navigable river, but that the survey maps showed that the portion of the river in suit was within the plaintiff's *mehal.* He gave the plaintiff a decree.

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The Subordinate Judge on appeal was of opinion that the fact that the survey maps showed the portion of the river in dispute [254] to be within the plaintiff's *mehai*, did not prove that either the bed of the river (being a tidal and navigable one) or the right of fishery therein, belonged to the plaintiff. He held that the bed of the river and the fishery were the right of the Government. He therefore allowed the appeal and dismissed the suit.

From this decision the plaintiff appealed.

Babu *Nalini Ranjan Chatterjee*, for the appellant.

The Senior Government Pleader (Babu *Hem Chunder Banerjee*) and Babu *Ram Churn Mitter*, for the Secretary of State.

Babu *Josoda Nandan Pramanick*, for the other respondents.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

JUDGMENT.

The dispute in this case relates to a portion of the river Khari. The plaintiff, as the *se-putnidar* of a property Dhoba, a revenue-paying estate, claims it as a part of his property. The defendants to the suit are the Secretary of State, and certain other individuals with whom the Collector of Burdwan has made a settlement of the *jalkar* of the said river. Their defence is that the river is tidal and navigable and is Government property; that the Government have always exercised proprietary right in it, and that therefore the plaintiff can have no claim to it. The Court of first instance gave a decree to the plaintiff, being of opinion that the portion of the river in question is a part of the permanently settled property Dhoba, and in coming to this conclusion relied especially upon the *thakbust* map of Dhoba in 1855.

On appeal, the Subordinate Judge has reversed the decree of the Court of first instance upon the ground that the bed of the river, it being tidal and navigable, belongs to the Crown, but that no grant from Government has been put in, conferring in express terms a right to this river or to the right of fishery in it, nor has any title by prescription been proved, and that the evidence as to the enjoyment of the right of fishery is meagre and unsatisfactory. On referring, however, to the *thakbust* map, produced by the plaintiff, he expresses himself as follows : " But it is to be observed that this *thakbust* demarcation is best proof of possession in the time of the *thak*, but it is no evidence of title. The mere fact that the river was demarcated appertaining [255] to the *mauza* Dhoba raises no presumption that it was let out to the proprietor of *towji* No. 1, as part and parcel of that estate at the Permanent Settlement."

At first sight, it might appear that the Subordinate Judge has come to a finding of fact which cannot be interfered with in second appeal. But it seems to us that he has committed an error in law in dealing with the matter before him.

In the course of the argument that we have had in this case, it was contended by the learned Government Pleader that the river Khari being tidal and navigable, it was a part of the public domain, and therefore the plaintiff could not claim any right in it. Having regard to this contention it may be useful in the first place to refer shortly to the law on the subject

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of ownership in tidal and navigable rivers in this country, as it has been expounded from time to time.

In *Doe d. Seebkristo* v. *East India Co.* (1), the Judicial Committee of the Privy Council held that the East India Company, as representing the India Government, has a freehold in the bed of a navigable river and in the land between high and low water marks. In *Gureeb Hossein Chowdhree* v. *Lamb* (2), it was held by the Sudder Dewani Adalut, that the bed of a tidal navigable river is not the property of any individual, but of the public, and that if any person claims an exclusive right in such river, he must shew that it has been acquired either by grant or by prescription, which is evidence of a grant from Government. The learned Judges there treated the Government as trustee for the public. In *Bagram* v. *Collector of Bhulloa* (3) a Division Bench of this Court expressed the opinion that the beds or channels of navigable rivers are ordinarily the property of Government, and that subject to the right of navigation, and such other rights, such rivers, and the soil over which they flow belong to the State; but they held at the same time that the *jalkar* rights in such rivers may exist as private property, and that what was once common to all, or was the property of the State, may become the exclusive property of individuals."

[256] In *Chunder Jaleah* v. *Ram Churn Mookerjee* (4), it was held that the right of fishing in navigable rivers does not belong to the public, and the Government is not prohibited by any law from granting to individuals exclusive right of fishing in such rivers.

In *Baban Mayacha* v. *Nagu Shravucha* (5), Westropp, C.J., agreed with the law as laid down in *Gureeb Hossein Chowdhree* v. *Lamb*, and expressed the opinion that the beds of tidal rivers in British India are, like those of rivers of Great Britain, *prima facie* regarded as vested in the Crown.

In *Prosunno Coomar Sircar*, v. *Ram Coomar Paroee* (6), Markby, J., without expressing any opinion as to whether a right of fishery in tidal and navigable rivers could exist, held that if it did exist at all, it must be derived from the Crown.

In *Hori Das Mal* v. *Mahomed Joki* (7), it was held by a Full Bench of this Court that the exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals, and that such right must in the generality of cases be proved either by proof of direct grant from the Crown or by prescription. Garth, C.J., in delivering the judgment of the Court, or at any rate of the majority of the Court, observed as follows: " Whether actual proprietary right in the soil of British India is vested in the Crown or not (a point upon which there seems some diversity of opinion) I take it to be clear that the Crown has the power of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands; and I can see no good reason why they should not have the same power of making settlements of *jalkar* rights and of lands covered by water as of lands not covered by water. In either case the settlement is made for purposes of revenue, and for the benefit of the public; and undoubtedly the practice of settling these *jalkars*, even in tidal navigable rivers, has existed in several parts of Bengal for a great many years. I have ascertained this fact by a reference to certain papers, for the perusal of which I am indebted to the courtesy of the

(1) 6 M.I.A. 267. (2) S.D.A. (1859) 1357. (3) Gap. No. W.R. (1864) 243.
(4) 15 W.R. 212. (5) 4 C. 53. (6) 2 B. 19. (7) 11 C. 434.

Board of Revenue." Referring to the mode in which a grant by Government [257] may be proved, he thus expressed himself: "Many of these grants of *jalkars* in tidal navigable rivers are very ancient, and although at the time when the settlements were made it is probable that in each case a *patta* was granted by the Government, I believe there are few of such *pattas* in existence at the present time, and the usual mode of proving such grants in the generality of cases is by secondary evidence of the grant itself, and such proof as can be obtained by the user and extent of the rights which were conveyed by it."

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Upon the cases that we have just referred to, it may be accepted as law on this side of India that the bed of a tidal and navigable river is vested in the Crown; and that the right of *jalkar* (fishery) in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property, subject of course to the right of navigation and such other rights which the public has in such rivers.

In the present case, the plaintiff claims the disputed portion of the river Khari under right derived from Government, his case being that it is part of estate No. 1, which was settled with the zemindars at the time of the Permanent Settlement.

The Munsif, in order to enable himself to decide the question whether the river was a part of the permanently settled estate, requested the Collector of Burdwan to send the papers connected with the permanent settlement of the estate, but that officer wrote back to say (as the Munsif states) that the *doul* and other papers contained no specification of the *mouzas* comprised in the *towji* No. 1. He did not send the papers which the Munsif required. The Munsif, however, was of opinion from the *thakbust* map and the other evidence in the cause that the river in question did really appertain to the permanently settled *mehal* Dhoba.

The *thakbust* map is an important piece of evidence in the case. The *thakbust* operations, we may take it, were conducted by responsible officers of Government, and it may therefore fairly be presumed that in demarcating this portion of the river as a part of *mehal* Dhoba, they satisfied themselves that it was a part of the [258] permanently settled estate. On referring to the rules framed by the Board of Revenue in connection with the preparation of *thakbust* records, we find it laid down in the year 1850 that the "*thakbust* is in future to embrace, besides the village boundaries, the demarcation of the boundaries of each *mehal* in a village. The Superintendent will in the first place lay down the village boundaries and then demarcate on his *thakbust* maps the boundaries of all important *mehals* having lands in that village. Every "*thakbust* map and *misl* must be examined and countersigned by the Superintendent himself before it is transferred to the surveyor." And referring to what may be the properties which should be considered as independent *mehals* entitled to distinct entry in the *thakbust* maps, we find "independent *mehals* paying revenue to Government," being mentioned, among others, as such properties. (See Young's Revenue Hand-book, App. No. 10, pp. 67 and 74). We find it also stated in the "Revenue Law and the Practice of the Revenue Department" compiled by Mr. Whinfield in 1874, that "the design of the survey is to ascertain the position, boundaries and area of estates and villages" (p. 210).

The *thakbust* operations in 1855 having been conducted, as we presume, under the rules thus laid down by the Board of Revenue, and the

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portion of the river now in dispute having been demarcated by responsible Government officers as part of the estate *towji* No. 1, the *thakbust* map becomes an important piece of evidence in favour of the plaintiff [see in this connection *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (1), as also an unreported case, Appeal from original decree No. 5 of 1890 decided on the 1st September 1890 by Macpherson and Ameer Ali, JJ.] No doubt, as has been observed by the Subordinate Judge, such maps are evidence of possession at the time; but he forgets that as such evidence of possession they are also evidence of title, as has been laid down in several cases in this Court (see the cases noted in Field's Law of Evidence, p. 220, and the cases *Syam Lal Sahu* v. *Luchman Chowdhry* (2) and *Syama Sunderi Dassya Jogabundhu Sootar* (1).

We observe that in this case the Government does not set up **[259]** any right of the public, either in the bed of the river or in the *jalkar*, and it would appear upon the pleadings that the Government have recently been dealing with this river as their own property. The question then being between the plaintiff as the owner of the permanently settled property Dhoba, and the Government claiming this property as their own, we need not in this case determine what may be the rights of the public in the river.

The only question that ought to be determined in the case is whether the property in dispute is a part of *towji* No. 1 Dhoba or no t.

The plaintiff is evidently not in a position to prove any express grant by Government, but the Munsif asked the Collector to send him the papers in connection with the permanent settlement of the estate. These papers, if produced, might have thrown some light on the question.

We consider it, therefore, right and proper to send the case back to the Subordinate Judge, with a direction that he will send for the papers in connection with the permanent settlement of Dhoba, and reconsider the case with reference to the remarks we have already made. Costs to abide the final result.

J. V. W. *Case remanded.*

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22 C. 259.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

CHANDMULL AND OTHERS *v.* RANEE SOONDERY DOSSEE AND OTHERS.* [28th August, 1894.]

Representative of deceased person—Representative of insolvent debtor—Civil Procedure Code, 1882, s. 252—Suit against widow of insolvent as his legal representative—Parties—Official Assignee—Form of decree.

The husband of the defendant was adjudicated an insolvent in 1891, and the usual order was made vesting his estate in the Official Assignee. He subsequently died without having filed his schedule and no schedule had ever been filed. After his death a suit was brought by a creditor **[260]** against the defendant as the "widow, heiress, and legal representative" of the deceased insolvent, in which suit a decree was made against her, "the amount to be levied out of the assets of the deceased in her hands." In an application by the defendant to have the decree set aside on the grounds that the Official

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*Application in the Original Civil Jurisdiction under s. 622 of the Civil Procedure Code, in the matter of Act XV of 1882 and of Suit No. 11457 in the Calcutta Court of Small Causes.

(1) 16 C. 186. (2) 15 C. 353.

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Assignee was a necessary party to the suit, and that the decree should have been against him as her husband's representative, as his estate was in his lifetime, and since had continued to be vested in the Official Assignee. *Held* that on the death of the insolvent his widow, the defendant, became his legal representative within the meaning of s. 252 of the Civil Procedure Code, and that the existence of the vesting order in no way affected her position as such representative. *Greender Chunder Ghose* v. *Mackintosh* (1); *Girdharlal* v. *Bai Shiv* (2) and *Kashi Prasad* v. *Miller* (3) referred to.

Held, also, that the Official Assignee was not a necessary party to the suit. The Official Assignee is not a necessary party to any suit to recover a money debt from a person who is either an insolvent at the time the suit is instituted or becomes insolvent pending the suit. But a decree made against an insolvent under such circumstances should be restricted in form so as not to allow the judgment-creditor by means of execution to obtain an advantage over the general body of creditors. *In re Hunt Monnet & Co., Ex parte Gamble* v. *Bhola Gir* (4) and *Miller* v. *Budh Singh Dudhuria* (5) referred to.

In this case the decree was varied by the omission of the words "to be levied out of the assets of the deceased in her hands," and liberty was reserved to the judgment-creditor to prove for the amount of his decree in the Insolvent Court, with a note that execution of the decree is stayed pending the insolvency.

[Appr., 25 M. 406 (421); R., 30 A. 486 = 5 A.L.J. 553 = A.W.N. (1908), 203; 5 S.L.R. 4 (7) = 12 Ind. Cas. 188.]

THIS was an application by the defendant Ranee Soondery Dossee to have set aside a decree, dated 2nd July 1894, made against her by the Chief Judge of the Calcutta Court of Small Causes.

It appeared that Hurro Nath Shaha, the husband of the applicant, had become insolvent, and a vesting order was made on 21st August 1891, by which all his estate and effects became vested in the Official Assignee. Hurro Nath Shaha subsequently died without having filed his schedule. On 28th May 1894 a suit in the Calcutta Small Cause Court was brought against Ranee Soondery Dossee, and other defendants, who were alleged to be her husband's co-sharers or partners, for the price of goods sold. In the [261] plaint in that suit Ranee Soondery Dossee was described as "the widow, heiress, and legal representative of Hurro Nath Shaha deceased."

Her grounds of defence to the suit were—(*a*) that the plaint disclosed no cause of action against her; and (*b*), that the Official Assignee was a necessary party to the suit. The other defendants pleaded "never indebted."

The record showed that the "suit was withdrawn against second and third defendants. First plaintiff solemnly affirmed and examined. No evidence offered for the defence. Decreed with costs, and pleaders' fee Rs. 45 as against first defendant, to be levied out of the assets of the deceased in her hands."

Ranee Soondery Dossee then applied to the High Court in its Original Civil Jurisdiction under s. 622 of the Code of Civil Procedure, to have this decree set aside on the grounds that the Chief Judge had failed to exercise a jurisdiction vested in him, and had acted illegally and with material irregularity, and a rule was issued calling on the plaintiffs to show cause why the decree should not be set aside.

Mr. *Jackson* and Mr. *O'Kinealy*, in support of the rule.

Mr. *Dunne*, showed cause.

The arguments and cases cited are sufficiently stated in the judgment of the Court.

(1) 4 C. 897. (2) 8 B. 309. (3) 7 A. 752.
(4) 1 B.H.C. 251. (5) 18 C. 43.

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JUDGMENT.

SALE, J.—In this case the husband of the defendant was adjudicated an insolvent, and the usual order was made vesting the estate in the Official Assignee. Subsequently the insolvent died. No schedule of debts was filed previous to his death, nor has any been filed since. After the death of the insolvent a creditor brought a suit in the Calcutta Court of Small Causes against the defendant "*as his widow, heiress, and legal representative*," and obtained a decree "*to be levied out of the assets of the deceased in her hands.*"

An application to set aside this decree is now made on behalf of the defendant, under s. 622 of the Civil Procedure Code, on the following grounds as stated in the petition: (1) That there is no cause of action against the defendant, her husband's estate being [262] vested in the Official Assignee; (2) that the Official Assignee, in whom the estate is vested, was a necessary party to the suit.

The questions argued before me were somewhat different in form.

First, it was said that the defendant, though admittedly the widow and heiress of the deceased insolvent according to Hindu law, could not, for the purposes of the suit, be treated as his legal representative, seeing that his estate was in his lifetime, and still continues to be, vested in the Official Assignee.

The second contention on behalf of the petitioner was that the Official Assignee was a necessary party to the suit, and that no decree as against the estate could be made in his absence; and that in any case the form of the decree was wrong.

The person who has the right to represent the estate of a deceased person is in the Civil Procedure Code called his representative, or legal representative: see ss. 244 and 252. There is no doubt that, under ordinary circumstances, the widow and heiress of a deceased person would be his legal representative within the meaning of s. 252. In the case of *Greender Chunder Ghose* v. *Mackintosh* (1). Pontifex, J., at p. 908 of the report, expresses the opinion that the term "legal representative" would include the widow and heiress.

Does the fact of the insolvency of the husband and the existence of the vesting order affect the widow's position as legal representative?

Can it be said that the vesting order makes the Official Assignee the legal representative of the deceased insolvent?

Section 252 does not seem to contemplate such a result. That section provides that a decree obtained against the legal representative of a deceased person may be executed as if it had been obtained against such deceased person personally to the extent of the property of the deceased person come to his hands if not duly applied by him. This provision is obviously inapplicable to the Official Assignee who is not accountable for any assets vested in him as such, except to the Insolvent Court, subject to whose orders such assets are held by him, and against whom, [263] therefore, in his official capacity, no personal execution can issue. The section does not contemplate the insolvency of the deceased party, and excludes the idea of the Official Assignee being regarded as the legal representative within the meaning of the section. Moreover the fact that the estate of the husband is not in the widow's hands, but in the hands of third parties, is no bar to the making of a decree against her in her representative character—*Girdharlal* v. *Bai Shiv* (2).

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(1) 4 C. 897. (2) 8 B. 309.

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It has also been held that the Official Assignee is not a *representative* of a deceased insolvent within the meaning of s. 244 of the Code. Clause (*c*) of s. 244 enables the Court executing a decree to determine "questions arising between the parties to the suit in which the decree was passed or their representatives." Where a judgment-debtor, after attachment of his property, was declared an insolvent, and the Official Assignee, in whom the estate had vested, applied to have the attachment removed, the lower Court treated the matter as one to be dealt with under s. 244. On appeal it was held that the Official Assignee cannot be considered to be a representative of a judgment-debtor within the meaning of s. 244, and that he should be treated as a third party—*Kashi Prasad* v. *Miller* (1). From these considerations it appears to me quite clear, that, on the death of the insolvent, his widow, the defendant, became his legal representative within the meaning of s. 252, and that the existence of the vesting order in no way affects her position as such representative.

It was open to the plaintiff as a creditor of the deceased insolvent, either to proceed to prove his claim in the insolvency proceedings, or to institute a suit against the widow as the legal representative of his debtor. Having adopted the latter course, no proceeding could be taken under s. 49 of the Insolvent Act to stay the suit, inasmuch as no schedule of the insolvent's debts and credits has been filed. The suit therefore having proceeded and a decree obtained, the second question arises, *viz.*, whether the decree is open to objection on the ground that it was obtained in a suit not properly constituted, the Official Assignee not being a party to such suit.

[264] The case of *In re Hunt Monnet and Co., Ex parte Gamble* (*Official Assignee*) v. *Bhola Gir* (2) seems to show that, as regards suits pending against a person at the time of his insolvency, the Official Assignee is not a necessary party, and that such suits may properly be continued against the insolvent in the absence of the Official Assignee, notwithstanding the insolvency. In that case it appeared that several creditors had instituted suits against a certain firm. After decrees had been obtained in most of the suits, but while some suits were still pending, the firm was declared insolvent. The usual vesting orders were made, by which the estate and credits of the insolvent firm and the separate estate of an insolvent partner were vested in the Official Assignee. On the same day, and also subsequently, the property of the firm was attached at the instance of various judgment-creditors. The Official Assignee then applied not to lay on any more attachments, and to have himself added as a party under s. 73 of Act VIII of 1859, not only in the suits which were then pending, but also in the suits in which decrees had already been made. After an elaborate exposition of the law, the result as to how insolvency affects the relative rights of the Official Assignee and the creditors of an insolvent as to suits pending at the date of insolvency is thus stated (p. 257 of the report): "The result then is that as to suits pending at the date of the vesting order, in which the insolvent is *plaintiff*, the law in England and India is the same, *viz.*, that the Official Assignee may, on certain specified conditions, carry on such suits for the benefit of the general body of creditors, in substitution of, but not as co-plaintiff on the record with, the insolvent. As to pending suits in which the insolvent is a *defendant*, the law in India is the same as the law in England, except that, under s. 49 of the Indian Insolvent Act,

(1) 7 A. 752.

(2) 1 Bom.H.C. 251.

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the Courts in India are specially directed, after the filing of the insolvent's schedule and before his discharge, to stay suits and all proceedings therein founded on any debt or demand inserted in the schedule, on proof to the Court's satisfaction that the debt or demand so inserted in the schedule is identical with that which forms the subject of the suits, &c., which they are asked to stay. As to any power of continuing such actions in substitution of [265] the insolvent, or of being made a party to the suit in addition to the insolvent defendant, the Official Assignee in India has not such power, any more than the corresponding functionary in England." Then as regards suits in which a decree has been made against a defendant prior to his insolvency the judgment proceeds thus: "Neither in England nor in India have the assignees of an insolvent ever been held to have the power, after judgment and decree, to get themselves made parties to the suit, with a view of moving for a new trial, setting aside the judgment, or for any other purpose whatsoever."

As regards the question of the position of the Official Assignee as to suits instituted against the insolvent or his representative after insolvency, no schedule having been filed, there is a recent decision of this Court which is in point. In *Miller* v. *Budh Singh Dudhuria* (1) the facts were as follows: A person was adjudicated an insolvent, and an order was made vesting his estate in the Official Assignee, but no schedule of debts and credits was filed. A suit for money was then brought against the insolvent in a mofussil Court, and subsequently, on the application of the plaintiff, the Official Assignee was added as a party defendant. The Court found that the amount claimed was due by the insolvent, and directed payment by the Official Assignee. On appeal to this Court, it was held that the Official Assignee had been wrongly made a party, and that the judgment against him was in a form which would entitle the judgment-creditor to be paid out of the estate preferentially, which was also wrong. The Chief Justice says: "The first order putting Mr. Miller's name on the record was in our opinion wrong. There is nothing in the Insolvency Act which enables a suit of this kind to be continued against the Official Assignee when the defendant has become insolvent, and this is not the case of the assignment of any interest within the meaning of s. 372 of the Code of Civil Procedure, such as would enable the plaintiff to proceed against the assignee. We think, therefore, that the Subordinate Judge was wrong in placing Mr. Miller's name on the record; but his name having been wrongly placed there, we think that [266] the judgment against him in this form must be wrong, and the reason is that such a judgment would work manifest injustice and prevent the beneficial operation of the Insolvency sections of the Act, because a judgment of this kind as against Mr. Miller comes to this, that he is to pay the money out of the estate in his hands, and that this man, the plaintiff, is entitled to get the whole of his claim, and that it is to be paid in full if the whole estate of the insolvent is sufficient to pay him. This is clearly wrong, and consequently this appeal must be allowed and the judgment of the Subordinate Judge and the order substituting Mr. Miller's name on the record must be set aside, and the case remitted to the Subordinate Judge for trial as against the original defendant."

That was the case of a suit instituted against the insolvent after the estate had vested in the Official Assignee. The present suit was brought

(1) 18 C. 43.

after the death of an insolvent against his representative. I see no essential difference between the two cases, and the principle which underlies the decision in the one case applies equally to the other. It is true that there have been instances in this Court where suits have been brought for money claims against both the insolvent and the Official Assignee as co-defendants. There are also cases where on the defendant becoming an insolvent pending the suit, the Official Assignee has been added as a party defendant, on the application of the plaintiff. But in all these cases the decree has been as against the debtor only, and as regards the decretal amount liberty has been reserved to the plaintiff to rank as a creditor in the insolvency.

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This practice has been adopted, not on the ground that the Official Assignee is a necessary party to these suits, but rather with the object of giving the Official Assignee notice of the claim and to prevent any question arising as to the *bona fides* of the proceedings. There are also cases in this Court where such suits have been allowed to proceed to a decree against the judgment-debtor, notwithstanding his insolvency in the absence of the Official Assignee, liberty being reserved in the decree to the judgment-creditor to prove in insolvency for the amount of his judgment debt.

The cases which I have cited in the Bombay Court and in [267] this Court are sufficient I think to establish the proposition, that the Official Assignee is not a necessary party in any suit to recover a money debt from a person who is either an insolvent at the time the suit is instituted or becomes insolvent pending the suit. But it is also clear that the decree made as against an insolvent under these circumstances, should be restricted in form so as not to allow the judgment-creditor, by means of execution, to obtain an advantage over the general body of creditors. The decree in the present case is free from objection, except as to the words "to be levied out of the assets of the deceased in her hands."

The defendant has denied assets, but even should there be assets in her hands they are still vested in the Official Assignee, and are beyond the reach of any creditor, except through the machinery of the Insolvent Court. If there are outstanding assets, the Insolvent Court, if moved, would immediately proceed to get in such assets.

Under this decree in its present form, the plaintiff would be entitled to obtain execution against the defendant, and, if there should be assets in her hands, to obtain payment thereout in preference to the other creditors. This would be a proceeding entirely contrary to the policy of the Insolvent Act, and contrary also to the policy of the Civil Procedure Code which favours *pro rata* distribution of a debtor's assets among all his creditors. The decree should be in the form adopted in this Court under similar circumstances. The words "to be levied," &c., should be omitted and liberty reserved to the judgment-creditor to prove for the amount of his decree in the Insolvent Court, with a note that execution of the decree is stayed pending the insolvency.

There must be an order therefore varying the decree in the manner indicated.

Each party must bear his own costs of the application.

Attorney for Ranee Soondery Dosse : Babu *N. C. Roy.*

Attorney for the plaintiffs : Mr. *N. C. Bose.*

J. V. W.

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[268] ORIGINAL CIVIL.

Before Mr. Justice Sale.

SREENATH BANERJEE *v.* EAST INDIAN RAILWAY COMPANY.*
[1st December, 1894.]

Written statement—Verification of written statement—Verification on behalf of Corporation—Principal officer of Corporation or Company—Civil Procedure Code (Act XIV of 1882), ss. 115, 435 *—Practice—Waiver of objection to verification.*

The Civil Procedure Code, by ss. 115 and 435, enables a principal officer of a Corporation to verify a plaint or written statement, and it is therefore not necessary that permission for that purpose should be obtained; but it should be shown in cases to which s. 435 applies that the person purporting to verify a plaint or a written statement on behalf of a Corporation or Company is a principal officer of the Corporation, and is able to depose to the facts of the case. If the plaint or written statement contains a statement to that effect, verification in the usual form would probably be sufficient.

Where suits had been filed against the East Indian Railway Company the plaints in which described the defendant Company as a Corporation, and an application was made for the admission on behalf of the defendant Company of written statements signed "The East Indian Railway Company by their constituted Attorney and Agent Richard Gardiner," who was described in the verification as the "Agent of the defendant Company," and the written statements contained no statement to the effect that he was a principal officer of the defendant Company and able to depose to the facts of the case: *Held*, that such evidence should be supplied by affidavit before the written statements could be admitted.

The provisions in the Code relating to the verification of written statements, however, being intended for the protection of plaintiffs, their observance might be waived by the plaintiffs, and if they were prepared to waive objections to the sufficiency of the verification, further evidence of the nature indicated might be dispensed with.

THIS was an application for the admission, in this and three similar suits, of written statements on behalf of the East Indian Railway Company, against whom the suits were brought and who were described in the plaints as a Corporation. The written statements were signed as follows: "The East Indian Railway Company, by their constituted Attorney and Agent Richard [269] Gardiner," who was described in the verification as "Agent of the defendant Company," the verification being signed, "Richard Gardiner." The application was made to the Judge sitting in Chambers.

Mr. *O'Kinealy* in support of the application.

Mr. *T. A. Apcar*, for the plaintiffs.

ORDER.

SALE, J.—This is an application for admission of written statements on behalf of the East Indian Railway Company in four suits instituted against the Company by various parties. These written statements purport to be signed, "The East Indian Railway Company, by their constituted Attorney and Agent Richard Gardiner," and in the verification which purports to be signed "Richard Gardiner" he is described as the "Agent of the defendant Company." That the East Indian Railway Company is a Corporation appears from the title of the plaint in each suit. This therefore may be taken to be an admitted fact. That being so, s. 435 of the Civil Procedure Code becomes applicable. Under that section, in a suit by the East Indian Railway Company, the plaint may be verified by any Director, Secretary or other principal officer of the

* Application in Original Civil Suits Nos. 450, 451, 452 and 564 of 1894.

Company able to depose to the facts of the case. This provision is also applicable to a written statement required to be filed by the defendant Company, being made so applicable by s. 115 of the Civil Procedure Code. As therefore the law itself enables a principal officer of a Corporation to verify a plaint or a written statement it is not, in my opinion, necessary that permission for that purpose should be obtained, but it should be shown, in cases to which s. 435 applies, that the person purporting to verify a written statement is a principal officer of the defendant Company or Corporation, and is able to depose to the facts of the case. If a plaint, or a written statement, contains a statement to that effect, the verification in the usual form would probably be sufficient. There is no such statement appearing in the written statements now presented for admission. The description in the verification of Richard Gardiner, as Agent of the defendant Company, is itself not verified, nor, if that description alone were verified, could it be assumed that he was a principal officer of the defendant Company and able [270] to depose to the facts of the case. That evidence in the case of these written statements must therefore be supplied by affidavit, and on that being done, the written statements may be presented to the Registrar for admission. The provision in the Code relating to verification of written statements, being intended for the protection of the plaintiffs, their observance may, I think, be waived by the plaintiffs. If, therefore, the plaintiffs are prepared to waive all objections to the sufficiency of the verification of the written statements, further evidence of the nature indicated may be dispensed with.

Attorney for the plaintiff: Mr. *A. G. Barrow.*

Attorney for the defendant Company: Messrs. *Morgan & Co.*

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22 C. 270.

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Before Mr. Justice Sale.

DOORGA MOHUN DASS v. TAHIR ALLY AND ANOTHER AND TAHIR ALLY AND ANOTHER v. KOORSOMBOO AND OTHERS.*

[4th July, 1894.]

Practice—Suit instituted on behalf of minor by next friend—Application for execution of decree by plaintiff on attaining majority and after death of next friend without complying with requirements of s. 451, *Civil Procedure Code.*

Unless there is an absolute bar created by positive enactment, a person who has attained his full age is *prima facie* entitled to proceed with a suit instituted on his behalf during his minority, or to make any application therein, and, if necessary, the Court will as a matter of course give him leave to proceed or act in his own name.

When a person, on whose behalf a suit had been revived and carried on by his next friend, made, after attaining his majority and long after the death of the next friend, an application in his own name for execution of the decree in the suit without having complied with the requirements of s. 451 of the Civil Procedure Code as to electing to proceed with the suit and obtaining leave of the Court to do so, and the application was admitted and notice of execution given to the defendant: *Held*, under the circumstances, that such omission to comply with the requirements of s. 451, though an irregularity, was not a bar to the application being allowed to proceed.

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* Application in Original Civil Suits Nos. 336 of 1876 and 171 of 1875.

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An application under s. 451, for leave to proceed with a suit, does not require any notice, but may be made *ex parte* at any time. Even if the application [271] in this case therefore were not itself a sufficient indication that the applicant elected to proceed with the suit, and that the Court in allowing him to proceed in his own name gave him the required leave (and *semble* that would be the case), the Court could give such leave at the hearing of the application *nunc pro tunc*.

The provision of s. 451 which requires the title of a suit to be corrected in such a case applies to a pending suit, and not to a suit after final decree in which it only remains to proceed in execution.

[R., 19 M. 127 (128) ; 11 Cr. L. J. 327 (329)=6 Ind. Cas. 367.]

THIS was the hearing of a rule to show cause why an order, dated 21st March 1882, which had been made in suit 171 of 1875, should not be enforced.

Suit 336 of 1876 was a suit on a mortgage brought by Doorga Mohun Dass against one Abdool Tyeb, and on his death in 1879 revived against his sons and representatives Tahir Ally and Amiruddin, in which the plaintiff had obtained a decree for Rs. 3,675. Suit 171 of 1875 was brought originally by Abdool Tyeb, and on his death revived by Tahir Ally and Amiruddin against (among others) Abdool Hossain and Abdool Kyem, the executors of the will of one Bunkerbhoy bin Allabux, the father of Abdool Tyeb, for a declaration of the right of the plaintiff in the estate and effects of Adam bin Allabux, one of the brothers of Bunkerbhoy, and for an account, &c. In both the suits on their revival after the death of Abdool Tyeb, Amiruddin, being then a minor, was represented by Tahir Ally as his next friend. In suit 171 of 1875 a decree was made on 17th July 1879, by which the executors were ordered to pay into Court to the credit of the suit two sums of Rs. 406-0-4 and Rs. 1,251-10-8 ; and by a further order made in the suit on 21st March 1882, they were directed to pay those sums into Court in two weeks from the date of the service of that order upon them. The order was served on them on 5th April 1882. Tahir Ally died in 1884, and Abdool Hossain in 1886, and on 17th March 1894, application for execution of the order was made by Amiruddin in his own name (he having then attained his majority) in the form of a tabular statement, but there being some irregularity in the application, it was returned and presented again on 4th April 1882. This application was to enforce the order of the 21st March 1882 against the surviving executor Abdool Kyem, and a notice was ordered to issue to him under s. 248 of the Civil Procedure Code.

[272] On 23rd April, on the application of Amiruddin, a rule was issued on Abdool Kyem to show cause why he should not pay into Court to the credit of these suits the sums of Rs. 406-0-4 and Rs. 1,251-10-8, which he had been directed to pay by the order of 21st March 1882.

The applicant did not comply with the requirements of s. 451 of the Civil Procedure Code as to obtaining an order of Court for the discharge of the next friend, and for leave to proceed in his own name, and at the hearing of the rule objection to the application being allowed to proceed was taken on this ground. The applicant was allowed, in answer to this objection, to put in an affidavit that he had attained majority.

Mr. *T. A. Apcar* and Mr. *Dunne*, showed cause.

Mr. *Sinha* and Mr. *R. Mitter* in support of the rule.

The arguments are sufficiently stated in the judgment of the Court.

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JUDGMENT.

SALE, J.—It appears that upon the death of one Shaik Abdool Tyeb in 1879, both these suits were revived in the names of Tahir Ally and Amiruddin, who were made co-plaintiffs in the second mentioned suit; and as Amiruddin was then a minor, Tahir Ally acted as his next friend. The second mentioned suit was a suit for an account against Abdool Hossain and Abdool Kyem as the executors of the estate of Ally bin Allabux. An account was taken, and in the result the executors were, by an order made on further directions on the 17th July 1879, directed to pay into Court two sums, Rs. 406-0-4 and Rs. 1,251-10-8. By a subsequent order, dated 21st March 1882, the executors were directed to pay these sums into Court within a specified time.

Tahir Ally died in 1884. Amiruddin, who then and thereafter had no next friend, applied in his own name for and obtained a rule as against the surviving executor, Abdool Kyem, to show cause why the order of the 21st March 1882 should not be complied with. The application was made at the last moment, apparently with the object of saving limitation. Abdool Kyem has appeared to show cause against the rule, and the cause which he has shown is of a twofold character. He says that the order of the 21st March 1882 had become barred by lapse of time before [273] this rule was obtained, and therefore that he is exempted from all liability in respect of that order. He also contends that the application itself is irregular, inasmuch as the applicant, when he obtained the rule, did not show that he had attained his full age, and also did not obtain leave under s. 451 of the Procedure Code to proceed in these suits in his own name. Both objections are of a purely technical character, and the question is whether they are sufficient to prevent the Court from compelling the defaulting executor to obey the order of 21st March 1882.

As regards the question of limitation the facts are these:—

On the 17th March 1894 the present applicant presented a tabular statement for execution of the order of 21st March 1882. The tabular statement was returned as not being in proper form. It was amended and again presented on the 4th April, supported by an affidavit, when an order was made for a notice to issue under s. 248 of the Procedure Code. In consequence of a further objection, which it is not necessary to specify, the application upon the same tabular statement and affidavit was again mentioned, and was finally disposed of on the 23rd of April. It must be taken upon these facts that the application, though not finally disposed of till the 23rd of April, was made on the 17th of March, or at latest on the 4th of April, and was in either case in time.

The next question is as to the effect of the objection under s. 451.

By that section a minor plaintiff, or a minor not a party to a suit, on coming of age, is required to elect whether he will proceed with the suit or application. If he elects to proceed with the suit or application, he is required to apply for an order discharging his next friend, and for leave to proceed in his own name.

That section does not in strictness apply to the facts as they appear in the present application, inasmuch as it is shown that the next friend had long been dead, and it further appears that the applicant himself attained his full age long previous to the present application.

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Is the applicant, nevertheless, precluded from making the [274] present application by the fact that he had not in the first instance obtained leave to proceed with the suit in his own name?

It is to be observed that the Civil Procedure Code requires every application on behalf of a *minor* to be made by his next friend, and provides that such application, if not so made, *may* be discharged. The words of the Code appear to give *discretionary* power to the Court to discharge the application made by minors who appear without a next friend. The procedure is the same as in the Courts in England. In the case of *Flight* v. *Bolland* (1) the Court, in its discretion, allowed a bill which had been filed by a minor to be amended by appointing a next friend for the plaintiff and inserting his name as next friend. That order was made on an application for dismissal of the suit by the defendant. The reason why no proceeding can be taken by an infant without the assistance of a next friend is, as stated in Daniel's Chancery Practice, 6th Edition, p. 105, "on account of an infant's supposed want of discretion, and his inability to bind himself and make himself liable for costs." And it would seem that the rule was intended for the protection and benefit of defendants, for it has been held that when a defendant waives this benefit and protection, the suit may proceed without a next friend. *Ex parte Brocklebank, In re Brocklebank* (2).

That being so as regards persons who are still minors, it appears to me that, unless there is an absolute bar created by positive enactment, a person, who has attained his full age, is *prima facie* entitled to proceed with a suit instituted on his behalf during his minority, or to make any application therein, and that, if necessary, the Court would, as a matter of course, give him leave to proceed or act in his own name.

I have already alluded to the death of the next friend as a circumstance which produced an alteration in the state of facts to which it was intended that s. 451 should apply.

In consequence of his death no application for his discharge could be made. But this it may be said would not affect the section, so far as it requires a minor plaintiff, who, on coming of age, elects to proceed with the suit, to obtain leave to proceed in [275] his own name. Accepting that view, still the present application would, in itself, be an indication that the applicant had elected to proceed with the suit, and that the Court in allowing him to proceed in his own name in effect gave him the leave referred to in the section; but if that were not so, and the case required it, I should be prepared to give formal leave to the applicant now.

As to the provision in that section requiring the title to be corrected, that would apply to a pending suit, and not to a suit after final decree, in which it only remains to proceed in execution.

No doubt Amirudd in proceeded irregularly in not first satisfying the Court that he had attained his full age. This he has now done by affidavit in answer to the objections taken by Abdool Kyem, and his having done so at this stage can only affect the question of costs.

An application under s. 451 is not required to be made on notice. An *ex parte* application under that section may be made at any time, but as the facts are now fully before the Court, it is not necessary that a fresh application should be made merely *pro forma* nor is it necessary that these suits should be revived. They are, as I have already said, not pending suits, and

(1) 4 Russ. 298.

(2) L.R. 6 Ch.D. 358 (360).

it seems to me that for the purposes of the present application the proper parties are before the Court. It is true that one of the executors has died, but that circumstance does not absolve the surviving executor from obeying the order of the 21st March 1882. The rule against Abdool Kyem will be made absolute, but, having regard to the irregularities in the inception of the application, I shall make no order as to costs.

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There will be an attachment against the person of Abdool Kyem, and also an attachment against his property as prayed, but the writ against his person will not be issued for a fortnight, and will then be issued only if the money be not previously paid.

J.V.W. *Rule made absolute.*

Attorney for the applicant: Babu *Surendro Nath Das.*
Attorney for Abdool Kyem: Mr. *A. H. Gillanders.*

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22 C. 276.

[276] APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

SABIR AND ANOTHER (*Appellants*) *v.* QUEEN-EMPRESS (*Respondent*).* [19th September, 1894.]

Rioting—Rioting armed with a deadly weapon—Common object of unlawful assembly, Statement of, in charge—Penal Code, ss. 147, 148, 149, *and* 304—*Error in charge misleading accused—Criminal Procedure Code* (1882), s. 225.

Before a conviction can properly be maintained for the offence of rioting, it is necessary that there should be a clear finding as to the common object of the unlawful assembly, and also that the common object so found should have been stated in the charge in order that the accused person might have an opportunity of meeting it.

Where a Sessions Judge in his charge to the jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge sheet:

Held, that, inasmuch as it was impossible to say which of the two common objects had been accepted by the jury, and it might well have been that they had accepted the one which had not been charged, and which consequently the accused had not had an opportunity of meeting, the conviction must be set aside.

If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under s. 148 of the Penal Code. It is only the actual persons so armed who can be charged under that section.

[F., 33 C. 295 (305) = 2 C.L.J. 516 (523) = 3 Cr. L.J. 153; 7 C.W.N. 512 (513); R., 35 C. 718 = 8 Cr. L.J. 203; 2 Bom.L.R. 1129 (1130); 38 P.W.R. 1907; D, 4 C. W.N. 196 (199); 36 C. 158 = 8 C.L.J. 69 = 12 C.W.N. 944 = 8 Cr. L.J. 129 = 1 Ind. Cas. 794]

THE appellants in this case were convicted, upon the unanimous verdict of a jury, of the following offences, *viz.*, (1) Sabir, with culpable homicide not amounting to murder committed in prosecution of the common object of an unlawful assembly, of which he was a member, by causing the death of one Nidu, with the knowledge that he was likely by his act to cause death, but without any intention of doing so, under s. 304 of the Penal Code; (2) Esaf, with being a member of an unlawful assembly in the prosecution of the common object of which one of its members, Sabir, committed culpable homicide, under [277] s. 149, taken with s. 304 of the Penal Code, and (3) both Sabir and Esaf, with rioting

*Criminal Appeal No. 527 of 1894 against the order passed by S. J. Douglas, Esq., Officiating Sessions Judge of Dacca, dated the 26th of July 1894.

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armed with deadly weapons under s. 148 of the Penal Code. Sabir was sentenced under s. 304, to rigorous imprisonment for seven years, and Esaf under ss. 149 and 304 to rigorous imprisonment for three years and a fine of Rs. 50, or in default to a further term of six months. No additional sentence was passed on them for the offences under s. 148. From these convictions and sentences the prisoners appealed to the High Court on the ground that the Sessions Judge had misdirected the jury on a variety of matters, the only ones however which are material being as follows, *viz*., (*a*) that he had directed the jury that Esaf was guilty under s. 148 of the Penal Code of being armed with a deadly weapon, because Sabir had been so armed, and although he, Esaf, had not himself actually had such a weapon in his hand; and (*b*) that he had directed them as to a common object of the unlawful assembly which was entirely different from the one set out in the charge upon which the prisoners had been committed to take their trial.

The facts elicited in evidence taken at the trial were, briefly, that Esaf, accompanied by Sabir and a number of other persons, of whom a few were little boys, were engaged in plucking mangoes in an orchard in which Esaf claimed to exercise this right; that Nidu, the deceased, came and remonstrated on behalf of his master, Kunja Behari Poddar, whereupon Koilas Pal, alleged to be on inimical terms with Kunja Behari Poddar, and being also present in the orchard at the time, or possibly some other person—the Sessions Judge, considering it immaterial to decide who—called out "bring me the *sala's* head;" and that thereupon Sabir struck Nidu over the head with a *lathi*, in consequence of which he died.

The charges upon which the prisoners were committed to take their trial at the Sessions were as follows:—

In the case of Sabir—

"*First*.—That you on or about the 3rd day of May 1894 at Panam (Bojh Moche) were guilty of the offence of rioting armed with a *lathi*, *i.e.*, a deadly weapon, and thereby committed an [278] offence punishable under s. 148 of the Indian Penal Code, and within the cognizance of the Court of Session."

"*Secondly*.—That you on or about the 3rd day of May 1894 at Panam (Bojh Moche) in the course of that riot committed culpable homicide not amounting to murder by causing the death of one Nidu by striking him on the head with a *lathi* and thereby committed an offence punishable under s. 304 of the Indian Penal Code, and within the cognizance of the Court of Session."

In the case of Esaf—

"*First*.—That you on or about the 3rd day of May 1894 at Panam (Bojh Moche) were guilty of the offence of rioting armed with deadly weapons and thereby committed an offence punishable under ss. 148 and 149 of the Indian Penal Code and within the cognizance of the Court of Session."

"*Secondly*.—That you on or about the 3rd day of May at Panam (Bojh Moche) joined that unlawful assembly, knowing that it was likely that force would be used, and in which force was used, and the death of one Nidu caused by a blow of a *lathi* on his head in taking away mangoes from a garden in charge of Nidu, and thereby committed an offence punishable under s. 304 and 149 of the Indian Penal Code and within the cognizance of the Court of Session."

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The portion of the Sessions Judge's charge to the jury material for the purpose of this report, and to which exception was principally taken by the appellants, was as follows :—

"The two accused are charged with having committed a riot on 3rd May last at Panam armed with deadly weapons.

"You must clearly understand what this means. The first element of riot is an unlawful assembly, which takes place when five or more persons congregate for the common purpose of doing something which is forbidden by law, such as mischief, criminal trespass, or any offence like beating or assaulting any person. The next stage is when any member of such unlawful assembly uses force or violence in prosecution of the common object of such assembly, in which case every member of such assembly is guilty of rioting (s. 146 of the Penal Code). The third stage, which forms the subject of the charge against the accused, is arrived at when any member of such unlawful assembly is guilty of rioting being armed with a deadly weapon, then by analogy of [279] s.145 of the Penal Code every member of such assembly is guilty of the offence of rioting armed with a deadly weapon. And when a man commits a riot armed with a *lathi*, and such *lathi* is used with violence on the human head, I don't think it requires any explanation from me to show that such *lathi* is a deadly weapon.

"It will be, therefore, necessary in the present case for you to find whether or not Sabir and Esaf were members of an unlawful assembly, in the common object of which one or more of their number used violence, being then armed with a dangerous *lathi*, so as to answer the requirements of s. 148 of the Penal Code.

"Sabir accused is also charged with having committed culpable homicide not amounting to murder by causing the death of Nidu during such riot under s. 304 of the Penal Code. That section is divided into two parts : the first part refers to an act which is done with the knowledge and intention of causing death, but which is not murder, owing to certain extenuating circumstances set forth in the exceptions to s. 300 of the Penal Code. The second part refers to an act which is done more or less recklessly with the knowledge that it may result in death, but without any intention of causing death. You must bear the difference in mind.

"Esaf is charged under ss. 149 and 304 of the Penal Code to the effect that he was a member of an unlawful assembly, in the prosecution of the common object of which one of the members, Sabir, caused the death of Nidu, in consequence of which Esaf, under s. 149 of the Penal Code, is guilty of such culpable homicide.

"Accordingly with regard to Sabir you must be satisfied that he caused such bodily injury to Nidu as caused his death ; if you find that such act was done without the intention of causing Nidu's death ; though Sabir may have known it was likely to cause his death, you will find that the latter part of s. 304 of the Penal Code applies.

"As for Esaf, in order to find him guilty as charged under s. 149 and s. 304 of the Penal Code, you must be satisfied that the act which caused the death of Nidu was done really with a view to accomplish the common object of the unlawful assembly, of which Esaf was then a member, or that such act was one which Esaf knew, or had reason to believe, would probably be committed in prosecution of the common object of such assembly."

The Sessions Judge then proceeded to deal with the evidence, and then continued :—

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"It is for you to say whether or not you believe the main features of the story for the prosecution so as to find the charges against the two accused substantiated.

"If you find that Kunjo Babu was in possession of this orchard, and if you find that these two accused with others, amounting to five or more in [280] number, went to this orchard to gather the mango fruit there and to enforce a supposed right to such fruit by Esaf, you can conclude that in so doing these two accused, and the others with them, were then members of an unlawful assembly, because you can safely consider such act on their party to be calculated to cause wrongful loss and annoyance to Kunjo Babu and to be criminal trespass. The next question is, was any force used by any member of such assembly in furtherance of their common object, *i.e.*, in taking away the mangoes? This depends on how far you believe the evidence for the prosecution, which is to the effect that when Nidu protested some one called out to bring his head to him, whereupon Esaf, Sabir, and the others surrounded Nidu and Bakhar, and Sabir struck Nidu with his *lathi* on his head with such force as to fracture his skull and so cause his death. If you accept this evidence and find that Sabir then struck Nidu on the head with his *lathi* you will also find Sabir and Esaf guilty, as charged, of the offence of rioting with a deadly weapon.

"On the next charge, you must be satisfied that Sadir struck Nidu this blow which killed him, and that it was struck in furtherance of the common object of the assembly then, and that Esaf knew that in accordance with the general object such blow would probably be delivered. This again depends on whether or not you believe the evidence that this blow was struck by Sabir. With regard to Esaf,it is not denied that he was present on this occasion, but it is urged that he is in no way responsible for what happened to Nidu. What was then the general object of this assembly? If you believe the evidence, it was to carry out the order and to bring Nidu's head because he prevented Esaf and the others from taking these mangoes, the purpose for which they had assembled, and the blow was struck accordingly. Did Esaf knew that this blow would be then struck? This is for you to decide. The evidence shows that he with Sabir and the others ran up to where Nidu and Bakhar were standing, and, though he had no stick in his hand himself, he was there with the others when Sabir struck Nidu in accordance with the order to bring 'the *sala's* head.' I think you can conclude that Sabir struck Nidu in prosecution of such common object then, and that Esaf must have known that Sabir would do so.

"The evidence in support of such charges appears to me to be satisfactory, and it seems to me that the prosecution has substantiated the case against these two men, but it is for you to decide.

"If you have any reason to doubt or disbelieve this evidence you will at once acquit these two men on all charges."

Mr. *Pugh*, Mr. *Donogh* and Babu *Harendra Nath Mittra*, for the appellants.

Mr. *M. Ghose*, for the Crown.

For the appellants it was contended that the alleged common object of the unlawful assembly should have been clearly set out [281] in the charges, and the case of *Behari Mahton* v. *Queen-Empress* (1) was relied on; that the jury must have been misled by the Judge's propounding two different common objects, one of which at least the prisoners could not

(1) 11 C. 106.

have been appraised of until the very end of the Judge's summing up; and that they must necessarily have been thereby prejudiced in their defence; and further that the conviction of a person under s. 148 of the Penal Code, because another member of the assembly had been guilty of rioting with a deadly weapon, was clearly unsustainable.

For the Crown it was argued that, although the conviction under s. 148 of the Penal Code could not be supported, the convictions on the other charges should not be set aside; that, although the charges had not been artistically drawn, a common object could be made out from the second charge against Esaf; and that at any rate s. 225 of Criminal Procedure Code would cure the defect if there was one.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

JUDGMENT.

In this case two persons have been convicted by a Judge and jury, and, of course, in accordance with the law, it is necessary for us to find a defect in the charge, or in some other portion of the procedure, before we can interfere with the conviction. On the question of sentence, however, that is in our hands.

The occurrence which led to this charge was a dispute about the possession of an orchard. It was claimed by Esaf, who is one of the appellants before us. The case of the prosecution is that the two appellants, with others, went to this orchard for the purpose of gathering the fruit of some mango trees growing there, and an altercation arose between them, and a man named Nidu, who was acting on behalf of the rival claimants to this orchard. In the end it is said that the accused Sabir struck Nidu on the head with a *lathi*, and that two days afterwards Nidu died. Sabir has been convicted under s. 304 of the Indian Penal Code of causing the death of Nidu, and there is no matter in the charge affecting his conviction under this section which can be **[282]** impugned. The only question, so far as he is concerned, is the question of punishment. He has been sentenced to seven years' rigorous imprisonment. That, of course, is a very heavy punishment. There is in his favour the circumstance that there was no premeditation before this attack was made. It was, apparently, the result of momentary excitement, and there was, so far as we know, only one blow struck. On the other hand, in the case of attacks or assaults where a blow so severe as to cause a man's death is given, and where weapons, which are in efficient hands unquestionably *lethal*, are used, it is impossible to inflict a light punishment. We do not think we would be erring if we were to reduce the sentence on Sabir to three years' rigorous imprisonment. We do not think we can reduce it to anything less, and accordingly we direct that the conviction be upheld, and the sentence reduced to three years' rigorous imprisonment.

The case with regard to Esaf stands upon an entirely different footing. He has been convicted under s. 148 and s. 304, read with s. 149 of the Penal Code. It is not disputed that there is no case against him under s. 148 of the Penal Code. That section says: "Whoever is guilty of rioting being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished," &c., and so on. The learned Sessions Judge is under the impression, acting upon what he calls the analogy of s. 146 of the Code, that if one member of an unlawful assembly is armed with a deadly weapon, or a weapon of offence, the other members of the assembly can be charged under s. 148.

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That is not so. It is only the actual persons who are so armed who can be charged under that section. The only way in which one person can be made liable for the acts of another is under s. 149. There being no case under s. 148, we think that the conviction is wrong under the latter section and must be set aside.

There is also, we think, no case under s. 149, read with s. 304. It was not really argued that the members of this assembly knew it to be likely that homicide would be committed in prosecution of the object of that assembly. With regard to the common object charged, as to which we shall refer presently, [283] that is to say, the taking away the mangoes from the trees, the learned Judge has, we think, in his charge, extended the phraseology of s. 149 too far, and having regard to the part which Esaf is proved to have taken, assuming the evidence to be true, in this matter, we think it would be straining the law to apply to it the provisions of s. 149 and make him liable for the death of this unfortunate man Nidu.

Now comes the real question in the case, and it is the only question which has presented any difficulty to us. Although Esaf may not be properly convicted either under s. 148 or s. 149 of the Penal Code, still it is competent to the Court to convict him under another section, which is one of the component parts of s. 148, namely, s. 147. As there was a conviction under ss. 148 and 149, it was unnecessary for the Judge to take the verdict of the jury under s. 147, but if there had been an acquittal under those sections, the Judge would have been bound to take their opinion as to whether Esaf was guilty of rioting, and, therefore, guilty under s. 147. It follows that, before we can acquit him altogether, we are bound to see whether he is entitled to an acquittal under that section also.

The objection made on his behalf to his being convicted under that section arises from the allegation of the prosecution, and the charge made, and the charge of the Judge, with reference to what is stated to be the common object of the assembly. In the charge upon which he was tried there is, apparently, a reference made to the common object of this assembly being to take the mangoes. It is pointed out by the learned counsel that, though it is not drawn very artistically, that is what the charge means, and practically says. The learned Judge, in his charge to the jury, with reference to this question, after going into other matters, to which it is not necessary here to refer, says this: "If you find that Kunjo Babu, that is the rival claimant, was in possession of the orchard, and if you find that these two accused with others, amounting to five or more in number, went to this orchard to gather the mango fruit there, and to enforce a supposed right to such fruit by Esaf, you can conclude that in so doing these two accused, and the others with him, were then [284] members of an unlawful assembly, because you can safely consider such act on their part to be calculated to cause wrongful loss and annoyance to Kunjo Babu and to be criminal trespass." That so far is perfectly right, and in accordance with the charge. The Judge goes on to say: "The next question is, was any force used by any member of such assembly in furtherance of that common object, *i.e.*, in taking away the mangoes? This depends upon how far you believe the evidence for the prosecution, which is to the effect that when Nidu protested, some one called out to bring his head to him, whereupon Esaf, Sabir, and the others surrounded Nidu and Bakhar, and Sabir struck Nidu with his *lathi* on his head with such force as to fracture his skull and so cause his death. If you accept this evidence and

find that Sabir then struck Nidu on the head with his *lathi*, you will also find Sabir and Esaf guilty, as charged, of the offence of rioting with a deadly weapon."

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Then he goes on : "On the next charge you must be satisfied that Sabir struck Nidu this blow which killed him, and that it was struck in furtherance of the common object of the assembly then, and that Esaf knew that in accordance with the general object such blow would probably be delivered. This again depends on whether or not you believe the evidence that this blow was struck by Sabir. With regard to Esaf, it is not denied that he was present on the occasion, but it is urged that he is in no way responsible for what happened to Nidu. What was then the general object of this assembly?" He then goes on, and this is an important part of his charge: "If you believe the evidence, it was to carry out the order to bring Nidu's head, because he prevented Esaf and the others from taking these mangoes, the purpose for which they had assembled." So we have here the Judge directing the jury that the general object of the assembly was to carry out the order to bring Nidu's head, the general object at that particular time. At first the general object was to take the mangoes, but as the proceedings developed, the object changed to one to injure Nidu, for, of course, the words do not really mean to bring his head, but to injure him.

Now, the jury having convicted under ss. 148 and 149, before we can say that there ought to be a conviction under s. 147, we must be satisfied that the jury have found an [285] unlawful common object. It is impossible for us to say, on the findings, whether they have given their verdict upon the unlawfulness of the common object to injure Nidu, or the unlawfulness of the common object to take the mangoes. It may well be, and, in dealing with these matters one is bound to consider the matter most favourably to the accused, that they preferred to accept the view that the common object was to injure Nidu, inasmuch as it did away with the necessity of coming to any conclusion on the question of the possession of the orchard. If they found that the common object of the assembly was to injure Nidu, that would be enough, and they need not find the other. But there is no charge whatever on this head; an entirely different common object has been charged.

Our attention has been called to s. 225 of the Code of Criminal Procedure, which provides that "no error in stating the particulars required to be stated in the charge, and no omission to state those particulars, shall be regarded at any stage of the case as material unless the accused was misled by such error or omission." In a case of this kind there may be evidence of a variety of common objects, but here, so far as we can see, it is impossible for us, on the evidence as it stands and having the charge there is at present, to say, that the jury accepted either one or the other of those common objects. They accepted one, it is true, but which one they accepted it is impossible for us to say. It may make a difference in the case if, as a matter of fact, they accepted the case that the common object was to injure Nidu. But that was a common object that was never charged at all, and the accused person had no opportunity of meeting it. Of course, the finding of the jury with regard to the common object may have very great effect upon the seriousness of the crime and, therefore, on the punishment.

In the result, we think we are bound to set aside the conviction of Esaf, but we think that this case is not one which we can deal with

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ourselves, and we accordingly direct that it be retried under a properly framed charge under s. 147 of the Penal Code, and that, until the trial, the accused Esaf be released on bail to the satisfaction of the Magistrate.

H. T. H. *Appeal allowed in part.*

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[286] CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Sale.

LILLA SINGH AND ANOTHER (*Petitioners*) *v.* QUEEN-EMPRESS (*Opposite Party.*)* [17th October, 1894.]

Estates Partition Act, 1876 *(Bengal Act VIII of* 1876), *ss.* 112 *and* 116—*Penal Code*, s. 186—*Obstructing public servant in discharge of his public functions—Amin, Power of, to measure lands in* butwara *proceedings—Public functions.*

The public functions contemplated by s. 186 of the Penal Code mean legal or legitimately authorised public functions, and were not intended to cover any act that a public functionary might choose to take upon himself to perform.

A *butwara* Amin, in proceeding to measure certain lands in the course of proceedings connected with the partition of an estate under Bengal Act VIII of 1876, was obstructed by certain persons who claimed the lands and objected to their being measured. The lands were stated in the report of the Amin to be the common land of estate No. 546, and of certain other estates. The persons who obstructed him were not co-sharers in that estate, and contended that the land, sought to be measured, had been divided amongst the *maliks* of the different estates, and different portions of it had been held separately by them. The persons so obstructing the Amin were charged with an offence under s. 186 of the Penal Code, the Deputy Collector in charge of the *butwara* proceedings being of opinion that s. 112 of the Act applied, and that the Amin was entitled to measure the land. The accused were convicted.

Held, that s. 112 is limited to cases where the community of interest in the land in dispute between the proprietors of the estate under partition as a body and the proprietors of other estates is admitted. When this is not admitted the provisions of s. 116 apply.

Held further, that, as there was no evidence to show that such community of interest was admitted, the accused were entitled to the benefit of the doubt, and to have the case treated as one under s. 116, and that as the procedure laid down in that section had not been followed, the Amin had no power to measure the lands, and could not be said to be a public servant acting in discharge of his public functions, and that the conviction must consequently be set aside.

[R., 24 C. 320 (323); 21 M. 78 (79) = 1 Weir 123.]

[287] THIS was a rule to show cause why an order passed by the Sub-Deputy Magistrate of Patna, and affirmed by the District Magistrate, convicting the petitioners of an offence under s. 186 of the Penal Code, should not be set aside.

The petitioners were residents in a village in *thana* Bask and were entitled to, and in possession of, certain lands in *mouza* Sikanderpur in the district of Patna. They were charged with having obstructed, in measuring certain lands, a *butwara* Amin, who had been deputed by the Deputy Collector to make a survey of certain lands in *mouza* Kajwar in connection with certain proceedings pending before him for partition of an estate under the provisions of the Estates Partition Act, 1876 (Bengal Act VIII of 1876).

* Criminal Motion No. 533 of 1894, against the order passed by C. J. O'Donnell, Esq., District Magistrate of Patna, dated the 27th of July 1894, affirming the order of Mendin Augier, Esq., Sub-Deputy Magistrate of Patna, dated the 10th of July 1894.

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The case for the petitioners was that the Amin having been deputed to measure lands in Kajwar was proceeding to measure the lands in Sikanderpur, which adjoined Kajwar, when they objected. The Amin was apparently acting at the instance of one Munshi Khan, who pointed the lands out to him, alleging them to be portion of Kajwar. No violence appeared to have been used, though the prosecution alleged that the petitioners had threatened to throw away the Amin's claim should he persist in measuring the lands, and that a crowd then assembled armed with *lathis*. The Amin appeared to have then left, and proceedings were subsequently commenced against the petitioners for obstructing the Amin, sanction having been given by the District Magistrate.

There was no doubt that a dispute did in fact take place. The Sub-Deputy Magistrate convicted the petitioners and sentenced them to pay a fine of Rs. 50, or in default to suffer two weeks' rigorous imprisonment.

The conviction was upheld, on appeal, by the District Magistrate. The petitioners then applied to the High Court, and a rule was issued which now came on for hearing.

Mr. *M. Ghose* and Babu *Dasarath Sanyal*, for the petitioners.

No one appeared to show cause.

It was urged in support of the rule that the Amin had no authority to measure the lands which he sought to survey, and [288] could not therefore be said to be a public servant acting in discharge of his public functions, and that, consequently, no offence under s. 186 had been committed.

The judgment of the High Court (BANERJEE and SALE, JJ.) was as follows :—

JUDGMENT.

The question raised in this case is whether the conviction of the petitioners under s. 186 of the Indian Penal Code is legal. They have been convicted under that section for obstructing a *butwara* Amin who proceeded to measure some lands in the course of partition of an estate under Bengal Act VIII of 1876. That the Amin was technically obstructed is not denied; that is to say, it is not denied that the Amin was told that he should not measure the lands he wanted to measure; but the accused deny having done anything more than that; nor does the Deputy Magistrate find that the obstruction was of any aggravated kind. The question, therefore, is reduced to this, namely, whether the accused, by preventing the Amin from measuring the lands in question, voluntarily obstructed a public servant in the discharge of his public functions within the meaning of s. 186 of the Penal Code. Now, the petitioners are not co-sharers in the estate under partition, which is estate No. 546 on the rent-roll of the Patna Collectorate. The land which the Amin wanted to measure, and was prevented from measuring, is stated by the Amin in his report submitted to the Deputy Collector to be the common land of estate No. 546 and of certain other estates; and the Amin, in the report just referred to, stated that the accused objected to his measuring the land on the ground that it had been divided amongst the *maliks* of the different estates, and different portions of it had been held separately by them. Upon this report of the Amin, the Deputy Collector in charge of the *butwara* proceedings thought that the case came under s. 112 of the Partition Act (Bengal Act VIII of 1876), which enacts: "Whenever any lands are held in common between the proprietors of two or more estates, one of which is under partition in accordance with the provisions

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of this Act, the Deputy Collector shall first allot to the estate under partition a portion of such common lands of which the assets are in proportion to the interest which the proprietors of such estate hold in the said common lands; and [289] all the provisions of this Act in respect of the allotment between the share-holders, in one estate, of lands which are held jointly by such share holders, shall, as far as possible, apply to the allotment of the proportionate share of such common lands to the estate under partition; and in respect of the service of notices, hearing of objections, and all other procedure in view to such allotment, the proprietors of the estate under partition, and the proprietors of all other estates who have an interest in the said common lands, shall be deemed to be joint proprietors of a parent estate, consisting only of the lands so held in common." If, therefore, the case came under s. 112, it would, as it seems to us, follow that the Amin would have authority to measure the lands in question in the same way as he had authority to measure the lands of the estate under partition which was held by the co-sharers in that estate exclusively. But in addition to the provisions contained in s. 112, there are certain other provisions relating to the subject of the measurement of lands not held exclusively by the co-sharers of the estate under partition, or lands as to the title to and possession of which there is dispute or doubt. These provisions are to be found in s. 116 of the Act, which provides that "if a dispute or doubt shall be found to exist as to whether any lands form part of the parent estate, the Deputy Collector shall enquire into the fact of possession, and shall report his conclusions with the reason thereof to the Collector, whereupon," the section goes on to provide: "The Collector may (whether the possession of disputed lands is with the proprietors of the parent estate or otherwise) order that the partition be struck off the file." or hold a preliminary enquiry, and issue further directions depending upon the result of such enquiry. A comparison of these two sections of the Partition Act goes to show that s. 112 is limited to those cases where the community of interest in the land in dispute between the proprietors of the estate under partition as a body and the proprietors of other estates is admitted. In the present case it is not at all clear that such community of interest is admitted, and the evidence for the prosecution leaves it in doubt, to say the least, whether the case comes under s. 112 or s. 116. If it comes under s. 116, the measurement Amin, without a special order from the Collector, made after the preliminary [290] enquiry referred to in that section, could have no lawful authority to measure the lands in dispute; and if the case therefore came under s. 116 of the Partition Act, the petitioners could not be held to be guilty of the offence of obstructing a public servant in discharge of his public functions within the meaning of s. 186 of the Indian Penal Code. As the evidence for the prosecution leaves the matter in doubt, the accused are clearly entitled to the benefit of that doubt.

A question might be raised as to whether, though not strictly authorized by law to measure the lands in dispute, still the *butwara* Amin, when he proceeded to measure the lands in the course of the *butwara* proceedings, was not acting in the discharge of his public functions. In one sense, no doubt, his proceeding to measure the lands could only have been in the course of his duty as a *butwara* Amin. He could have no private interest in the matter. But we are of opinion that the question must be answered in the negative. The public functions contemplated by s. 186 must mean legal or legitimately authorised public functions. They could not have been intended to cover any act that a public functionary

might choose to take upon himself to perform; and, if that is so, and, as we have said above, if the case comes under s. 116, it would not be within the legitimate functions of the Amin to proceed to measure the lands without express authority from the Collector. This view is, we think, fully supported by the cases of *Reg.* v. *Bhagtidas Bhagvandas* (1); and *Queen-Empress* v. *Tulsiram* (2). The result then is that this rule must be made absolute, and the convictions and sentences set aside, and the fines, if realized, refunded.

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H. T. H. *Conviction quashed.*

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[291] CRIMINAL REVISION.

Before Mr. Justice Banerjee and Mr. Justice Sale.

SIDHESWAR TEOR (*Petitioner*) *v.* GYANADA DASI (*Opposite Party*).*
[14th November, 1894.]

Maintenance, Order of Criminal Court as to—Criminal Procedure Code, 1882, s. 488—Breach of order for monthly allowance—Imprisonment for default of payment of maintenance—Sentence absolute.

A wife, who had obtained an order for maintenance against her husband on the 1st August, applied to have it enforced with respect to three months then in arrears. A distress warrant having issued without anything being realised, the husband was brought up under a warrant for his arrest. The husband previous to his arrest petitioned the Court to be allowed to prove his altered circumstances and his inability to pay. On that petition an order was passed that he could produce the evidence after the amount due was paid. On being brought up, and not paying the amount due, an order was made committing him for one month under s. 488 of the Code of Criminal Procedure. The day following his commitment his brother tendered the money and asked for his release. The Magistrate took the money but refused to order the release, holding that under the section the punishment of imprisonment was absolute and not dependent on payment of the maintenance allowance. The husband moved the High Court contending (1) that the order of imprisonment should not have been passed without an opportunity being given him of proving the change in his circumstances which would show that the order to pay required modification; (2) that the section did not authorize imprisonment unless wilful neglect to comply with the order be proved; and (3) that the imprisonment authorized by the section being only a mode of enforcing payment, he should have been released on the amount being paid.

Held, that the first ground was untenable, inasmuch as the order for maintenance carries with it all its proper consequences as long as it remains in force.

Held, also, that before an order for imprisonment under the section can be passed it must be proved that the non-payment of the maintenance is the result of wilful negligence, and that there being no evidence of that in the case the order was bad.

Held, further that the imprisonment which can be awarded under the section is not a punishment for contempt of the Court's order but merely a means of enforcing payment of the amount due, and that upon the payment of that amount being made the husband was entitled to be released.

Biyacha v. *Moidin Kutti* (3) dissented from.

[F., 25 C. 291 (292); 5 O.C. 316 (318); R., U.B.R. 1892—1896, 70 (71).]

[292] THE facts of this case were as follows:—

On the 1st August 1894 the wife of the petitioner applied to the Magistrate of Hooghly to enforce the payment of arrears of maintenance

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* Criminal Revision No. 630 of 1894, against the order passed by E.G. Drake-Brockman, Esq., Officiating District Magistrate of Hooghly, dated the 18th October 1894.

(1) 5 B.H.C. Cr. 51. (2) 13 B. 168. (3) 8 M. 70.

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at the rate of Rs. 9 per month for herself and her children, which had been directed to be paid by the petitioner by an order dated the 28th April.

On the 3rd August the Magistrate passed the following order: "Some evidence must be produced within seven days to show the amount has not been paid."

On the 10th August a distress warrant was issue l to realize the sum of Rs. 27.

On the 1st September a return was made showing that nothing had been realized, and a warrant was issued for the arrest of the petitioner.

On the 7th September he was brought up, and an order was made on him to pay the amount, *viz.*, Rs. 27, or in default to be imprisoned for one month, and he was allowed out on bail to pay the amount within fifteen days. The petitioner thereafter failed to appear, and as his surety could not produce him, on the 3rd October a warrant was issued for his arrest. He was brought up on the 17th October and an order passed in the following terms: "Defendant appears to day. He has not paid the money. Warrant of commitment to jail for one month under s. 488, Criminal Procedure Code, to be issued."

On the following day, the 18th October, a brother of the petitioner applied to be allowed to pay the money and to have him released. On that application the Magistrate passed the following order: "The amount may be paid by the petitioner, but the punishment of imprisonment is absolute. It is not dependent on payment of the maintenance allowance."

It further appeared that on the 15th September the petitioner applied to the Magistrate to be allowed an opportunity to produce evidence to prove his altered circumstances and his inability to pay the amount which he had been ordered to pay as maintenance, and that the Magistrate passed the following order thereon: "Can produce evidence after the money is paid."

The petitioner after the order of the 18th October applied **[293]** to the High Court to have it set aside as illegal upon the following grounds:—

(1) That in the absence of any evidence as to wilful neglect on the part of the petitioner the Magistrate ought not to have issued the warrant and taken proceedings thereunder.

(2) That the amount having been deposited the Magistrate ought to have received it and released the petitioner.

(3) That the sentence of rigorous imprisonment was not warranted by law and was too severe.

(4) That the petitioner ought to have been allowed an opportunity to produce evidence as to the absence of neglect on his part in not paying the maintenance, and other circumstances to show his inability to pay and non-liability to pay the same.

A rule was issued which now came on for hearing.

Babu *Hara Kumar Mitter*, for the petitioner in support of the rule.

No one appeared to show cause.

The judgment of the High Court (BANERJEE and SALE, JJ.) was as follows:—

JUDGMENT.

It appears that the petitioner in this case was directed by an order, dated the 28th of April last, to pay maintenance to his wife, Gyanada Sundari and his son, at the rates of Rs. 6 and Rs. 3 a month, respectively. The amount due for the last three months having remained unpaid, an

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application was made for the enforcement of payment, and a warrant for levying the amount by distress was issued on the 10th of August last. The amount not having been realised under the warrant, the arrest of the defendant was ordered on the 1st September, and on the 7th September the following order was made: "Brought up to-day to pay Rs. 27 or in default to be imprisoned for one month. Allowed bail to the amount to pay in fifteen days." The amount not having been paid, the following order was made on the 17th October: "Defendant appears to-day. He has not paid the money. Warrant of commitment to jail for one month under s. 488 of the Code of Criminal Procedure to be issued." Then on the 18th idem an application was made by the brother of the defendant offering [294] the amount due and praying for the release of the defendant. Upon that, this is the order that was made: "The amount may be paid by the petitioner, but the punishment is absolute. It is not dependent on payment of the maintenance allowance." The amount was received, but the defendant was not released.

It is this order the propriety and legality of which have been called in question before us, and we have been asked, under s. 439 of the Code of Criminal Procedure, to set it aside for three reasons—*first*, because an opportunity should have been allowed to the petitioner to prove the change of circumstances which he alleged in his petition and which went to show that the order required to be modified; *secondly*, because no sentence of imprisonment is authorised by s. 488 of the Code of Criminal Procedure, unless it is shown that there was wilful neglect to comply with the order of the Court; and, *thirdly*, because the imprisonment that is authorised by s. 488, being only a mode of enforcement of payment, should have been ordered to cease as soon as the payment was made.

We do not think that the first ground is tenable. Though, upon a change of circumstances being shown, the existing order may be modified, still, so long as that order remains in force, it must carry with it its proper consequences. This view is, we think. to some extent supported by the case of *Nepoor Aurut* v. *Jurai* (1).

The second ground urged before us is, however, in our opinion, a valid ground for our interfering with the order. The provisions of the third paragraph of s. 488 being of a penal character ought, as observed by Mr. Justice Straight in the case of *Queen-Empress* v. *Narain*(2) to be strictly construed, and, as far as possible, construed in favour of the subject. The paragraph runs thus: "If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, &c." It is necessary, therefore, before the order can be enforced by a sentence of imprisonment, that it should be made out that the non-payment of maintenance was [295] the result of wilful negligence on the part of the defendant. There is nothing on the face of the order to show that that condition has been satisfied. All that the Magistrate says in his order of the 3rd August is this: "Some evidence must be produced within seven days to show that the amount has not been paid." The Magistrate here seems to think that the mere fact of non-payment of maintenance being made out would be sufficient to justify an order sending the defendant to jail. That view is, in our opinion, quite wrong.

(1) 10 B.L.R. Ap. 33=19 W. R. Cr. 73.

(2) 9 A. 240.

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We are also of opinion that the third ground is valid, though we must say that the question raised in connection with it is not altogether free from difficulty. The language of the third paragraph of s. 488 is not very explicit, and this creates some difficulty in construing it; and that difficulty is enhanced by the fact that the Madras High Court has in the case of *Biyacha* v. *Moidin Kutti* (1) taken a view which is different from that which we are now disposed to take. Mr. Justice Hutchins observes: "The question is a difficult one, but we are bound to go by what the Legislature has said, and I am constrained to hold that, although the Magistrate is not bound to order the full term of imprisonment for which the defaulter is liable under s. 488 of the Code of Criminal Procedure, yet whatever time is ordered must be served. The language of that section, and of the corresponding form in sch. V., is very different from that employed in cases where the imprisonment is to cease on payment." And Sir Charles Turner, Chief Justice, adds: "It is difficult to see what object the Legislature can have had beyond the enforcement of the payment unless it be to punish the husband for contempt of the order; but I am unable to say that the language of the Code warrants any other construction than that which has been adopted by my learned colleague."

No doubt, if the construction put upon the section by the Court below had merely led to anomalous or unreasonable consequences, but had clearly been the only construction warranted by the language of the section, we should be bound, however great the unreasonableness might be, to follow the express words **[296]** of the law. But with all respect for the learned Judges who decided the case of *Biyacha* v. *Moidin Kutti* (1), we must say that the language of the section is not so explicit and clear in favour of the view taken by the Magistrate. The section says: "If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month." That shews that a sentence of imprisonment can be passed only after there has been wilful neglect to comply with the order, followed by an unsuccessful process of distraint; and in that contingency, the sentence of imprisonment is to be "for the whole or any part of each month's maintenance remaining unpaid after execution of the warrant." This, to our minds, clearly indicates that the imprisonment that is ordered is, in the first place, not a punishment for contempt of the Court's order, as the learned Judges of the Madras High Court in the case cited above seem to think; and, in the second place, it is *for* the whole or any part of each month's allowance remaining unpaid after execution of the warrant. It cannot be regarded as a punishment for the breach of the order; for, if that were the case, the punishment would follow upon the breach of the order, irrespective of any success or the reverse in the levying of the amount by warrant, whereas that is not what the section enacts. According to the express terms of the section, the disobedience of the order may be never so gross and wilful, and yet, if the amount ordered to be paid is realized in full by execution of the warrant, no sentence of imprisonment is to follow. This conclusively shows that the sentence is not for the disobedience or contempt of the Court's order. Nor again would it be right in our opinion to hold that the sentence of

(1) 8 M. 70.

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imprisonment is an absolute sentence, for the law says that the Magistrate may sentence such person "for the whole or any part of each month's allowance remaining unpaid" to imprisonment. That shows [297] that the imprisonment is for the unpaid portion of the maintenance or, in other words, that it is owing to default of payment of the unrealised portion of the maintenance; and, if that is so, the imprisonment that is ordered ought to cease upon payment being made.

We should add that even if the meaning of the section had been otherwise, still, in the exercise of our powers of revision under s. 439 of the Code of Criminal Procedure, we should have felt bound to reduce the sentence to imprisonment for a day or for such term as has been already undergone.

For these several reasons we think that the order complained of must be set aside and the petitioner discharged.

H. T. H. *Rule made absolute and order set aside.*

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Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

THE KATRAS-JHERRIAH COAL COMPANY, (*First Party*), *Petitioners v.* SIBKRISHTA DAW & COMPANY, (*Second Party*), *Opposite Party.** [17th December, 1894.]

Criminal Procedure Code (*Act X of* 1882), ss. 145, 146—*Possession, Inquiry, as to—Time at which Magistrate is to determine who was in possession—Order passed under* s. 146 *on proceedings taken under* s. 145, *Criminal Procedure Code.*

In setting aside an order passed by a Magistrate under s. 145 of the Code of Criminal Procedure, the High Court has power itself to pass such order as should have been made by the Magistrate in the case.

It is impossible to lay down any hard and fast rule which may be applicable to all cases as to the exact point of time to which an enquiry under s. 145 must be directed, and the time at which possession must be found in one party or the other must be governed by the facts of each particular case.

To hold that the Magistrate is precluded from enquiring into anything before the date when he actually commenced his own proceedings might in some cases lead to a person who has been acting in an unwarrantable manner misusing the process of the law to enable him to carry out a high-handed and improper scheme, which could never have been the intention of the Legislature.

[298] In a proceeding under s. 145 regarding a dispute between two parties concerning certain collieries, it appeared that the first party were certainly in possession of the buildings which contained the office where the business of the collieries was transacted, and where all the cash books and papers of the business were kept, and that the second party had during a period of about fourteen days prior to the commencement of the proceedings succeeded in obtaining possession of the pits, wharves, tramways, etc., of the colliery by what the Court considered to be a high-handed and improper scheme and acting in an unwarrantable manner The Magistrate, considering himself bound to find who was in actual possession at the date of the commencement of the proceedings by himself, passed an order in favor of the second party.

Held, that such order was bad, and that as the second party was undoubtedly not in possession of the whole of the property in dispute, and the effect of it was to place them in possession of the portion that was in the possession of the first party, the proper order to make under such circumstances was one under s. 146 attaching the property.

[R., 1 C.L.J. 331 (333); D., 30 C. 112 (120); 5 C.W.N. 710 (711); 11 C.W.N. 743 (744).]

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* Criminal Revision No. 641 of 1894, against the order passed by J. E. Webster, Esq., Officiating Joint Magistrate of Ranigunge, dated the 1st of October 1894.

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THIS was a rule calling upon the opposite party to show cause why an order passed by the Joint Magistrate of Ranigunge, under the provisions of s. 145 of the Code of Criminal Procedure, declaring the second party, through their manager and servants, to be entitled to maintain possession of certain collieries until ousted therefrom in due course of law, should not be set aside, and such other order made as the Court might think fit.

The facts of the case are fully stated in the judgment of the High Court.

The *Advocate-General* (Sir *Charles Paul*), Mr. *T.A. Apcar*, Mr. *C.C. Robinson* and Babu *Narsing Dutt*, for the petitioner, in support of the rule.

Mr. *Jackson*, Mr. *M. Ghose*, Mr. *R. Mitter*, Mr. *P. L. Roy*, and Babu *Hara Prasad Chatterjee*, for the opposite party.

The following cases were cited during the arguments at the hearing of the rule:—

Government v. *Gholam Mahomed* (1); *Dustur Husang Jamasji* v. *Fell* (2); *Petition No.* 348 *of* 1870 (3); *Poresh Narain Roy* v. *Watson* (4); *In the matter of the Petition of Pirthiram Chowdhry* (5); *The Queen* v. *Protab Chundra Barrooah* (6); *Rakhal* [299] *Dass Singh* v. *Sheo Pershad Singh* (7); *Bunwari Lall Misser* v. *Radha Pershad Singh* (8); *In the matter of the petition of Mohesh Chunder Khan* (9); *The Queen* v. *Ballubh Kant Bhuttacharjee* (10); *In the matter of the petition of Kali Prosunno Roy* (11); *Munglo* v. *Durga Narain Nag* (12); *Chockalingam* v. *Ammalalchi* (13); *Ambler* v. *Pushong* (14); *Chunder Koomar Poddar* v. *Chundra Kanta Ghose* (15); *In the matter of the Petition of Jai Lal* (16); *Jaga Kishore Acharjya Chowdhuri* v. *Khajah Ashanullah Khan Bahadur* (17); *In the matter of Huchapa* (18); *Bechu Sheikh* v. *Deb Kumari Dasi* (19); *Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (20); *Abhayessari Debi* v. *Shidhessari Debi* (21); *Raneegunge Coal Association* v. *Hem Lall Ghatwal* (22); *Krishna Dhone Dutt* v. *Troilokia Nath Biswas* (23).

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

There is really no dispute about the facts in this case, and the only thing we have to consider is what is the just and legal order to make, under the circumstances disclosed by the evidence of both parties.

On the 13th of October 1893 Babu Purno Chunder Daw, the second party in these proceedings, let certain collieries at Sheebpur with their appurtenances to the Katras-Jherriah Coal Company, who are the first party, for the term of eight months on certain terms as to royalties, &c., and subject to a proviso that the company should be at liberty to purchase

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(1) 1 N.W.P. (Agra) H.C.Cr. 33. (2) 6 B.H.C.Cr. 30. (3) 6 M.H.C.App. XIII. (4) 17 W.R.Cr. 3. (5) 20 W.R.Cr. 51. (6) 21 W.R.Cr. 2. (7) 24 W.R. Cr. 73. (8) 1 C.L.R. 136. (9) 4 C. 417. (10) 11 W.R. Cr. 36=7 B.L.R. 324. (11) 23 W.R. Cr. 58. (12) 25 W.R. Cr. 74. (13) Weir 772. (14) 11 C. 365. (15) 12 C. 521. (16) 13 A. 362. (17) 16 C. 281. (18) 15 B. 152. (19) 21 C. 404. (20) 15 C. 527. (21) 16 C. 513. (22) 24 W.R. Cr. 17. (23) 12 C. 539.

the whole of the property demised, at any time during the term, for the sum of one hundred and fifty thousand rupees, payable partly in cash and partly in debentures of the company. The company took [300] possession of the property and proceeded to work the collieries, and on the 29th of December gave notice to the lessor of their intention to purchase the whole property in accordance with the proviso. When this was done, the contract of sale was complete, the property was sold to the company, within both the ordinary and the legal meaning of the word, and all that remained to be done was to carry out the contract by the conveyance of the property, and the payment of the price in the manner provided by it. After this the usual correspondence seems to have passed between the solicitors as to the title and the various clauses of the proposed conveyance, and on the 10th of August the vendor's solicitor wrote to the purchaser's solicitor making certain demands, and saying that unless the matter was at once completed on the terms required by him, his client would consider the matter at an end, and everything as cancelled. There is nothing in these papers to enable us to express any opinion as to which party was in the wrong in any of the questions which had been raised, or indeed to say what those questions were, but on the 11th the purchaser's solicitors replied, repudiating the right of the vendor to cancel the contract, discussing the questions raised in the letter of the 10th, and saying that their clients had always been ready and willing to carry out the contract.

On the same 10th of August, the vendor, Purno Chunder Daw, sent a person of the name of Boroda Kanta Ghosh, who had been a contractor at Sheebpur, from Calcutta to Sheebpur to work the collieries for him. This person arrived at the place on the morning of the 11th, and on the 13th Behari Lal Chatterjea, the head Babu in the vendor's office at Calcutta, left for Sheebpur to make arrangements for the working of the collieries, and from the 14th to 23rd these two persons were engaged in informing the people engaged in working the collieries that Purno Chunder had not sold the collieries and in getting them to agree to work for them. From the time when the company began to work the collieries in October, Mr. John English was the Resident Manager on their behalf, and continued to be so until the 9th of August 1894, when he was dismissed by the agents of the company, and handed over charge to Mr. Darby, who had been appointed by the company to take his place. Mr. [301] English did not leave the place, but by the permission of Mr. Darby continued to occupy the manager's house, because he said it would be inconvenient for him to remove at the moment, and in fact he has remained there until the present time. Mr. Hunter was the Engineer of the company from the time when they commenced to work, and continued to be so until the 24th of August, when, in consequence of the action of Babu Purno Chunder, he refused to act for them any longer, and announced his intention of working for the other party. He has always resided in one of the houses at the collieries. On the night of the 14th Behari Lal Chatterjea and Mr. English went to Calcutta, where they saw Babu Purno Chunder on the 15th, when Mr. English obtained a letter from him appointing him to manage the collieries on his behalf. Mr. English returned to Sheebpur on the same night. Behari Lal Chatterjea returned on the night of the 17th. On the 16th Mr. Darby became alarmed, and applied to the Police Inspector for protection. On the 17th the Inspector sent a Head Constable to the place, and himself followed on the 19th. He then saw that both "Mr. English and Mr. Darby were Managers." On the 22nd he submitted a report, on receipt

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of which proceedings were taken under s. 107 of the Criminal Procedure Code, and on the 3rd of September both the Managers were bound down. On the 20th August Mr. Darby applied to the Sub-Divisional Officer at Ranigunge, asking that he would order that the company should be kept in possession of the Sheebpur Collieries. The Sub-Divisional Officer replied the same day, declining to accede to his request "as he appeared to be in possession of the collieries," and on the 21st Mr. Darby wrote again pressing his request, but no action was taken by the Magistrate. On the 24th a letter dated the 23rd was received by the agents of the company in Calcutta from Babu Purno Chunder, informing them that he had appointed Mr. English manager of the collieries, and requesting them to make over charge to him. On the same day, the 24th, at about half past five o'clock in the morning, Mr. Darby found that all the persons employed at the place, except himself and his assistant, Mr. Deveria, had renounced the service of the company, and had agreed to work for Babu Purno Chunder. Mr. Hunter on that morning told him that he was **[302]** no longer his servant, and that he had taken service with the other party, and on going to the pits he found Mr. English there, engaged in sending miners down to get the coal for his master Babu Purno Chunder. The Police Inspector was present, and when Mr. Deveria intimated his intention of using force to prevent the miners from going down the pits, he informed him that he should not allow force to be used, and Mr. English said that at a whistle he could call one or two hundred men to aid the police. Mr. Darby then went to his own bungalow, then to the office of the collieries where the books, papers and cash of the collieries were in the safe, locked up the office, handed the key to Mr. Deverine, the Police Inspector, and himself went to Ranigunge to see the Magistrate, leaving Mr. Deveria in charge of the house in which he had been living, and his servants in charge of his furniture, clothes and other effects. On the 28th Mr. Darby presented a formal petition to the Sub-Divisional Officer praying him to institute proceedings under s. 145 of the Code of Criminal Procedure, and that the company might be maintained in possession, and on the same day the Sub Divisional Officer made an order refusing to interfere. As we have said before, the Sub-Divisional Officer on the 3rd of September, made orders binding both Mr. Darby and Mr. English down to keep the peace, and, on the same day, he made an order under s. 145, ordering the company and Babu Purno Chunder to appear in his Court on the 10th and put in written statements, and adduce such evidence as they could in support of their claims. The taking of the evidence was commenced on the 10th, was concluded on the 26th, and on the first of October the Sub-Divisional Officer gave his judgment. He thought that, upon the authorities on the subject, the question he had to consider was who was in *de facto* possession on the 3rd of September, and he found that from the 16th of August to the 23rd, the second party was gradually gaining possession, and had from the 23rd of August to the time when he was giving his judgment, been *de facto* in "peaceful and undivided possession of the collieries, the tramways and wharfs." He adds that had he known from the first how serious the dispute was, he should have at once taken proceedings under s. 145, and that had he done so, there was little doubt that his decision would have been different, but, **[303]** having regard to the fact that he thought his enquiry must be limited to the time subsequent to the 3rd of September, that being the day on which he first commenced his own proceedings under the section, he

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declared the second party to be in possession of the Sheebpur and Kanthi collieries, together with the tramways wharfs and buildings appertaining thereto, and maintained them in possession until ousted by law.

In the view we take of the facts of the case, it is not necessary for us to express any opinion as to the exact point of time to which an enquiry under the section must be directed, and we only mention the point in order that we may not be understood as agreeing that in the present case the enquiry must be limited to the time during which the evidence was being taken. It is, we think, impossible to lay down any hard and fast rule which may be applicable in all cases, and we do not understand that the Courts have ever attempted to do so. All that they have done has been to decide when, according to the facts of the case then before them, the possession was to be found. In the present case, it is admitted on all hands that on the 20th of August the company were, at all events, in partial possession of the whole of the property which was the subject-matter of the dispute, and on that day Mr. Darby appealed to the magistrate to have his possession maintained, which could mean nothing but that he asked for an enquiry under s. 145. This request was refused, because, as the Magistrate now admits, he had not sufficiently appreciated the position of affairs, which had no doubt changed to some extent when he actually commenced proceedings on the 3rd of September. But to hold that under such circumstances the Magistrate is precluded from enquiring into anything before the date when he recorded his own proceedings. which he now tells us he ought to have done thirteen days before, is, we think, to allow a person who has been acting in an unwarrantable manner to misuse the process of the law to enable him to carry out his high-handed and improper scheme, and this we cannot believe to have been the intention of the Legislature. But however this may be, we think it is clear upon the evidence of the second party themselves that they were not in possession of the subject-matter in dispute on the 3rd of September, and that they never in fact [304] got into possession of an important part of it, until they were actually put in possession of it by the final order of the Magistrate made in this proceeding on the 1st of October, and it cannot be doubted that a Magistrate under this section has no power to place either party in possession of the subject-matter in dispute, or any part of it, but only to find who is in possession of it as a whole, and, if that is impossible, to make an order under s. 146.

The subject-matter upon which the Magistrate's final order operated was "the Sheebpur and Kanthi collieries, together with the tramways, wharfs and buildings appertaining thereto," and of this there can be no doubt, that the buildings which contained the office, where the business of the collieries was transacted, and where all the cash, books and papers of the business were kept, was not only a portion, but a very important portion, without which the business of the collieries could not be carried on. It is no doubt true that by the 23rd of August, the agents of Babu Purno Chunder had succeeded in getting all the persons employed in the actual work of winning the coal and conveying it to the wharfs to agree to work for them, and by this means had obtained control of the out-door operations, and their adherents were in such force on the ground, that any attempt by Mr. Darby and Mr. Deveria to resist them must have been hopeless. But this was not the state of things with reference to the office and some of the other buildings, or, in other words, to that portion of the subject-matter of the dispute, where the indoor business of the collieries was carried on. The office was in the possession

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of Mr. Darby on the morning of the 24th. When he left, he locked it up, and handed the key to the Inspector of Police, no doubt for safe custody, and when Mr. English was giving his evidence on the 24th of September he told the Magistrate that he had not yet got possession of the office where he used to work, that it was at that time locked up with the papers of the Katras-Jharriah Coal Company in it in charge of the police.

These are the undisputed facts, and the only question is what is the proper order to make under the circumstances. It is clear that the order made by the Magistrate must be set aside, **[305]** as its effect is to place the second party in possession of the office and other portions of the buildings, of which they had not obtained possession before, and no one suggests that the Magistrate had any power to do this, but it is pressed on us by Mr. Jackson that this is all we can do, and that when this is done we cannot ourselves make the order which on the undisputed facts the Magistrate ought to have made, and at first sight we were much disposed to take that view. An examination of the authorities however shows that this Court has on several occasions not only set aside orders of Magistrates made under this Procedure, but has also itself made the order which should have been made by the Magistrate, upon the facts as proved at the inquiry [*Ambler* v. *Pushong* (1) ; *Reid* v. *Richardson* (2)]. It is, we think, clear that if we have the power to make an order, this is a case in which we ought to exercise it, as if we merely set aside the Magistrate's order and leave matters in the condition in which that order has placed them, we shall be allowing the process of the law to be used by Babu Purno Chunder for a high-handed and unlawful purpose, inasmuch as Mr. English tells us that he can command the services of 5,000 miners to defend his position if it is assailed, and under such circumstances he would certainly be in a position to retain by force possession of the offices, &c., possession of which was improperly given him by the order of the Magistrate.

During the time from the 20th of August to the 3rd of September, the second party had no doubt gained possession of a large part of the subject-matter of the dispute, whilst the first party continued in possession of the remainder, and as under these circumstances it is manifestly impossible to find that either of the two parties was in possession of the whole, the case is literally within the provision of s. 146, and the only order which could legally be made under the circumstances would be an order attaching the subject-matter of dispute under that section. Such an order will have the effect of withdrawing the enjoyment of the collieries from both parties, until the dispute has been settled or decided by some tribunal competent to deal with it, and this is the order which we propose to make.

[306] We set aside the order of the Sub-Divisional Officer of Raniguoge and direct that under the provisions of s. 146 of the Code of Criminal Procedure the Sheebpur and Kanthi collieries, together with the tramways, wharfs and buildings appertaining thereto, be attached until a competent Civil Court has determined the rights of the parties thereto or the person entitled to the possession thereof.

H.T.H. *Order set aside and fresh order made.*

(1) 11 C. 365. (2) 14 C. 361.

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APPELLATE CRIMINAL.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

JAHIRUDDIN v. QUEEN-EMPRESS.* [21st December, 1894.]

Unlawful assembly—Common object—Murder—Prosecution of common object—Penal Code, s. 149.

Neither of the cases, *Queen* v. *Sabed Ali* (1) and *Hari Singh* v. *The Empress* (2), lays down any hard and fast rule as to the circumstances under which one member of an unlawful assembly can be deemed guilty of an offence committed by another under the provisions of s. 149 of the Penal Code, and every case must be decided on its own merits. In dealing with such cases, while on the one hand it is necessary for the protection of the accused that he should not, merely by reason of his association with others as members of an unlawful assembly, be held criminally liable for offences committed by his associates, which he himself neither intended, nor knew to be likely to be committed, on the other hand it is equally necessary for the protection of the peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. Those two cases respectively emphasize the necessity of keeping these considerations in view. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent [307] to which he shares the community of object, and as a consequence of this the effect of s. 149 may be different on different members of the same unlawful assembly.

[F., 8 C.L.J. 561=9 Cr. L.J. 32.]

THE accused in this case was charged with murder under s. 302 of the Penal Code read with s. 149, and also with an offence under s. 436.

The charges were made in respect of a riot which had taken place some time before, and in respect of which certain other persons had been previously tried and convicted, the present accused not being then tried as he had absconded. He was tried before the Sessions Judge and two Assessors, one of whom considered he ought to be acquitted, while the other was of opinion that he was guilty.

The Sessions Judge convicted him and sentenced him to transportation for life. His judgment, which fully states the facts and the evidence in the case, was as follows:—

"This is a supplementary case and the essential facts may be stated as follows:—

"Complainant Samaruddin and others, took a settlement of some *beel* land covered with jungle in the village of Kaikhalli Pubrampur, about three years ago from Jagabandhu Sikdar and others. The lease was granted in Phalgoon, and in the Aswin following the lessees made a *basha* or temporary residence on part of the land and proceeded to clear the land round it. It appears that the Sikdars were the last in a series of tenure-holders, and the *maliks* denied the title of one of the under tenure-holders and gave a lease of the same land to certain persons, amongst whom it is said the present accused was—at any rate he gave out that he was one of the lessees. These new lessees then advised the complainant and his co-sharers to leave, but were not heeded. It is said that accused himself

* Criminal Appeal No. 786 of 1894 against the order passed by R.H. Anderson, Esq., Additional Sessions Judge of Backergunge, dated the 27th August 1894.

(1) 1 B.L.R.F.B. 347=20 W.R Cr. 5. (2) 3 C.L.R. 49.

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used to threaten the earlier lessees. He had a *basha* and some land a little to the south of complainant's *basha*. However, nothing of much consequence happened until noon on the 7th Jasbti (*i.e.*, 20th May 1893). The complainant and six others, namely, Safiruddin, Asmad and Maddi, Armanullah, Nazamuddin and Maizuddin had finished or were at their mid-day meal in the *basha*, which I should say consisted of two sheds with a *hatina* or verandah, when they heard shouts, and some of them going outside it was seen that a body of forty or fifty men was coming armed, six of them with guns and the others with spears and *lathis*. They had come to the ditch on the south of the *basha*, and told complainant's party to go. The latter refused. There was some abuse on both sides, and then the six men with guns fired. Safiruddin dropped dead, Asman went to the border of the *basha* and fell, and the others of complainant's party ran away, some north and [308] some east into the jungle. Of these the complainant Nazamuddin and Maddi had also been shot. Then accused who had been seen amongst the attacking men with what the witnesses think was a spear came with two other men and set fire to the *basha*, while the rest of the mob, hearing a man had been killed, ran off. Having set fire to the *basha* accused and his companions dragged Safiruddin's body to one of the boats which belonged to the *basha* and proceeded along the *khal* which borders the *basha* on the south. They were lost to sight when they entered the jungle, but as it was afterwards discovered left the boat and body not very far off. Then a little afterwards complainant's party began to return or be brought to the *basha*. Word was sent to the police who were not far off. The Sub-Inspector came and recovered Safiruddin's body and sent it in for examination and sent the wounded men to Ferozepur for treatment. Asman died on the way. The others who were not so seriously injured recovered, but Maddi to this day cannot use his leg properly and Nazamuddin's hand is crooked. Seven persons were sent up for trial. Three were sentenced to be hanged, and three were sentenced to transportation for life. One was acquitted. The High Court on appeal confirmed the sentence of death passed on two of the men and commuted that on the third, who was young, to transportation for life. These three men had guns. The present accused absconded. There is ample evidence of this in the present record. As to the facts generally I need say nothing. I think the evidence is too strong to admit of the very slightest doubt that the occurrence was as I have above described. The only questions are whether this accused was one of the attacking party, was armed with a spear, set fire to the *basha* and helped to remove Safiruddin's corpse. The complainant and the other four survivors of the party who were in the *basha* at the time have been examined. They all declared that they saw the accused with what they think was a spear, and complainant and two others further swear that they watched the proceedings from the edge of the jungle where they had taken refuge and saw accused help to set fire to the *basha* and remove Safiruddin's corpse. The two others of complainant's party say they fainted on reaching the jungle. Besides this, there is the evidence to the same effect of Jagabandhu Sikdar and Sreenath Sikdar, whose *basha* lay a little to the east of the complainant's *basha* and of two under-tenants of the complainant and his co-sharers by name Samiruddin and Nasaruddin, whose *basha* lay to the west of complainant's *basha* near the *khal* and past whose *basha* the boat was taken with the corpse in it. Now, though I am not altogether satisfied with the evidence of the two Hindus, I am quite convinced that the other witnesses have told the truth. The accused was well known to these persons. He had had his cultivations and *basha* not far off the complainant's *basha* for years,

and there was a long altercation before the guns were fired, so that there was ample opportunity of observing who the principal men of the attacking party were. Accused was named in the complainant's first information, and the story then told is substantially the same as that now told, **[309]** and several of the witnesses distinctly named this accused in previous examinations. The defence is that accused had one Naderali who is connected with the complainant and some of his co-sharers (they are really all in some way connected with each other) imprisoned some time before the occurrence, that accused gave up his land in that locality some years before, and that as a matter of fact he was miles away celebrating a feast on account of his sister's marriage at the time of the occurrence. There have been many witnesses called to prove the *alibi.* I have nothing to say of their evidence except that it is absolutely worthless from beginning to end. It is true that accused did prosecute Naderali and have him imprisoned, but that was some years before the occurrence, and it turns out that Naderali's brother is one of the accused in this case. If accused had really given up his land and gone away some years before, it is in the highest degree impossible that complainant who had been badly wounded would have thought of this man as soon as the Sub-Inspector arrived, which was soon after the occurrence. As to accused giving up his lands he has produced some documents, which, though hardly proved, go to show that he did sell the land, but at the same time took an agreement that it was to be reconveyed to him if he paid the money within a certain time, which time had not nearly elapsed when the occurrence took place. The *kabala* is not produced, only the *ikrar* is. In fact, there is nothing to show he gave up possession of the land or that he did not take a sub-lease from his vendors, while the complainant and his witnesses positively state that he was living there in his *basha* and cultivating the adjoining land down to the date of the occurrence, immediately after which he disappeared. I have said before he is stated to have claimed to be one of the lessees of the land already leased to the complainant and his co-sharers. There is no doubt whatever that accused was living in that locality and cultivating land there at the time of the occurrence. Whatever transactions there may have been regarding the land he originally held, the first Assessor thinks that accused's residence being doubtful renders his identification doubtful. I altogether fail to understand this. He was a known man, though he came from another and distant village, and the witnesses did not know where his original *bari* was. The police only say what they learnt. The accused's own documents describe him as of Haligakati, which is where the complainant and his witnesses say they heard he came from, and in the first information he is said to be *at present* of Pubrampur, and his father's name was not known. Accused now says his *bari* is in Gubabari, that is adjacent to Haligakati, but on his own witnesses' showing he has not been living there since the occurrence but somewhere in the south at a place called Dhansagar. The fact is the man is a wanderer, who lives in various places according to circumstances. As to what the *panchayat* says about not knowing the accused, and as to accused's *basha* not being in his list in accused's name, that may well be. It is an out-of-the-way place in a *beel.* It is doubtful from the evidence if it is in the *panchayat elaka,* and it may be in some one else's name. The list **[310]** was not produced to test this matter, and indeed it is not of the slightest consequence. The chowkidar knew the accused and his *basha* well enough. Accused's brother, I should perhaps note, is said to have been living in that *basha* and cultivating with him. How accused lives

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may be surmised from the head constable's evidence regarding his capture. He was making his way south in a boat at dead of night, was armed with a most formidable knife, a blade I should say nearly 2 feet long and a *lathi*, and had concealed himself under a *juntra* (rain shield) at the bottom of the boat. I have no doubt the head constable has told nothing but the truth regarding the capture.

"The witnesses have been cross-examined at great length but are not shaken. Much is attempted to be made of the plantain trees and castor plants on the sides of the *basha* as though they were dense jungle which would prevent men being identified. But the evidence shows they are sparse plants, as indeed we should expect round a new *basha*. Witnesses might even confuse the present condition of the plants with that of over a year ago, and make them denser than they really were then, but after all there is no doubt on the evidence recorded that the plants were thin and scattered. The Sub-Inspector noted this at the time.

"The *nal* (reed) jungle too was sparse in places and dense in others and not of the same height everywhere, so that there is no reason for doubting that the witnesses could have seen what was going on in the *basha*.

"In fine there is not a shadow of doubt that the witnesses, or most of them, if we omit the two Hindus, could identify the accused, and I am quite satisfied they did identify him. He was, as I said before, named at once, and the part he played in removing the corpse of Safiruddin at any rate was mentioned. That was in his absence. It is to be further remarked that up to the setting fire to the house the witnesses candidly admit accused did nothing in particular. I do not doubt he had a spear as they say. For these reasons I believe the evidence adduced by the prosecution and find accused Jahiruddin guilty of offences punishable by s. 302 with s. 149 of the Penal Code, and s. 436 of the Penal Code, and direct that he be transported for life."

Against this conviction and sentence the accused appealed to the High Court.

Babu *Dwarka Nath Chakravarti*, for the appellant.

The Deputy Legal Remembrancer, (Mr. *Kilby*), for the Crown.

The judgment of the High Court (BEVERLEY and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The appellant has been convicted by the Sessions Judge of Backergunge, under s. 302, read with s. 149, and under s. 436 of the Indian Penal Code, of the offence of murder **[311]** which was committed by some members of an unlawful assembly of which he was a member, in prosecution of the common object of that assembly, and of the offence of causing mischief by fire to a human dwelling, and he has been sentenced to transportation for life.

In appeal it is contended before us, *first*, that the evidence is insufficient to warrant the finding that the accused was present at the riot; *secondly*, that, even if it be found that the accused was present at the riot, the evidence is insufficient to warrant his conviction for murder, the requirements of s. 149 of the Indian Penal Code, not being shown to have been fulfilled; and, *thirdly*, that the evidence is insufficient to warrant the conviction under s. 436 of the Indian Penal Code.

With reference to the first and the third contention it is enough to say that we have considered the evidence and the comments upon it by

the learned vakil for the appellant, but we see no reason to think that it is either insufficient or unreliable. We think it is sufficient to warrant the finding that the accused was present at the riot, and after the firing of the guns, when the rioters began to disperse, on hearing that a man had been killed, he, along with certain other members of the unlawful assembly, removed the dead body of Safiruddin and set fire to the huts of the attacked party.

In support of the second contention the learned vakil for the appellant relies strongly on the finding of the Court below that, up to the setting fire to the house, the accused did nothing in particular, and upon the authority of the decision in the case of the *Queen* v. *Sabed Ali* (1), urges that the conviction under ss. 302 and 149 should be set aside. On the other hand, Mr. Kilby for the Crown contends that, considering the facts that the accused was one of a body of rioters of whom six were armed with loaded guns and fired them in a volley, that he was himself armed with a spear, and that after the murder he removed the dead body of Safiruddin the conviction for murder should be held to be right, and he relies upon the case of *Hari Singh* v. *The Empress* (2).

[312] We do not think that either of the two cases cited lays down any hard and fast rule applicable to all cases. The only general principle laid down by the majority of the Full Bench in *Sabed Ali's* case is that, in order to bring a case under the first part of s. 149 of the Indian Penal Code, the offence, which is there spoken of as committed in prosecution of the common object of the unlawful assembly, must be one which is committed with a view to accomplish the common object. But each of the two cases was decided with reference to its own facts, and every case depending upon the application of s. 149 of the Indian Penal Code must be so decided.

In dealing with such cases, while, on the one hand, it is necessary for the protection of accused persons that they should not, merely by reason of their association with others as members of an unlawful assembly, be held criminally liable for offences committed by their associates, which they themselves neither intended, nor knew to be likely to be committed, on the other hand, it is equally necessary for the protection of peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offenders with one common object. The cases of *Sabed Ali* and *Hari Singh* cited above, respectively, emphasize the necessity of keeping in view the one and the other of these two conflicting, but equally necessary, considerations. We may add that members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and that the knowledge possessed by each member of what is likely to be committed in prosecution of their common object, will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object; and, as a consequence of this, the effect of s. 149 of the Indian Penal Code may be different on different members of the same unlawful assembly.

Having these considerations in view, and having carefully gone through the evidence, we think the appellant has been rightly convicted under s. 302, read with s. 149 of the Indian Penal Code. He had an interest

(1) 11 B.L.R. 347 = 20 W.R. Cr. 5. (2) 3 C.L.R. 49.

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in the subject-matter of the dispute; [313] he had, previous to the occurrence, used threats to the persons in possession. On the scene of the occurrence he was present armed with a spear, and was among those who were carrying the guns and who fired the fatal shots; and after the murder was committed, instead of leaving the place at once, he busied himself in removing the dead body of Safiruddin and in setting fire to the huts of his adversaries. These facts, in our opinion, clearly show that the conditions, required by s. 149 to be fulfilled in order to make one member of an unlawful assembly guilty of an offence committed by any of his associates, have been satisfied in this case. They fully warrant the conclusion that the murder that took place was committed in prosecution of the common object of the unlawful assembly, of which the appellant was a member, namely, the turning out of the opposite party from the huts in question at any risk, in which common object he fully shared, and, further, that he knew it to be likely that murder would be committed in prosecution of that common object.

We must, therefore, affirm the conviction and sentence and dismiss the appeal.

H. T. H. *Appeal dismissed.*

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22 C. 313.

APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Sale.

LOLIT MOHAN SARKAR (*Appellant*) *v.* THE QUEEN-EMPRESS (*Respondent*).* [2nd November, 1894.]

Criminal Breach of Trust—Penal Code, ss. 408, 463, 464, 467 *and* 471—*Criminal breach of trust by a servant—Forgery—"Dishonestly"—"Fraudulently"—Fabrication of a document to conceal a contemporaneous or past embezzlement.*

An accused person who was in the service of zemindars, and whose duty it was to pay into the Collectorate Government revenue due in respect of their estates immediately before the due date of a *kist*, received from them a certain sum of money with no specific instructions as to its application. On receipt of that money he paid a portion only of it into the Collectorate on account of the revenue, and having done so he then altered the *challan* given back to him showing the amount actually paid, and made it appear that a much larger amount had been paid in than was the fact. This *challan* he sent to [314] his employer for the purpose of showing the application of the money. He was charged (1) with criminal breach of trust as a servant (s. 408 of the Penal Code) in respect of the difference between the amount actually paid into the treasury and the amount shown to have been paid in by the altered *challan*; (2) with forgery (s. 467) in respect of the *challan*; and (3) with using a forged document (s. 471) in respect of the same document. The accused was convicted on all these charges. It was contended (*a*) that the charge under s. 408 was not sustainable, inasmuch as the money was not alleged to have been sent to the accused for the specific purpose of paying the Government revenue, and that the accounts between him and his employers had not been adjusted and that it was not shown whether at the date of the alleged breach of trust the accused was indebted to his employer on the reverse; (*b*) that the charges under ss. 467 and 471 were bad as there was no evidence to support them, and even admitting the alteration of the *challan* such alteration did not come within the term "forgery" as used in the Penal Code, not having been made with the intention of causing any wrongful gain or wrongful loss, but with the intention of screening the offence of criminal breach of trust which had been previously committed.

Held, that as the money was sent to the accused immediately before the *kist* day, and the *challan* was sent to the employers showing in its altered state the

* Criminal Appeal No. 597 of 1894 against the order passed by R. R. Pope, Esq., Officiating Sessions Judge of Jessore, dated the 8th of August 1894.

amount really payable as revenue which merely covered the whole amount remitted, it was reasonable to infer that the accused was aware of the implied purpose for which the money was remitted, and as he deposited a very much smaller amount than that remitted and tried to pass off the altered *challan* as genuine, there was a dishonest misappropriation of the difference sufficient to constitute the offence under s. 408.

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Held, further, that it is not necessary for the purpose of constituting the offence of forgery that the false document should be made with the intention of committing a fraud or dishonesty in the future, and that if the intention with which a false document is made be to conceal a fraudulent act which has been previously committed the intention cannot be other than to commit fraud, and the offence of forgery, as defined in s. 463 is committed. The word "fraudulently as used in s. 464 must not be taken as being the same as "dishonestly" and implying wrongful gain or wrongful loss, but must be taken to mean as "with intent to defraud."

Empress of India v. *Jiwanand* (1), and *Queen-Empress* v. *Girdhari Lal* (2) dissented from.

Queen Empress v. *Vithal Narain Joshi* (3), and *Queen-Empress* v. *Sabapati* (4) followed.

Held, therefore, that upon the facts of the case there was ample evidence to show that the accused had abetted the forgery of the *challan* and [315] had used the sum, and that he had been properly convicted of all the offences charged against him except that of the actual forgery, and that he should have been convicted of abetment of that offence.

[F., 37 B. 666 (670) = 20 Ind. Cas. 998 (1000) = 14 Cr.L J. 518 (520) = 15 Bom.L.R. 708 = 2 Bom. Cr. C. 115; 11 Cr. L.J. 185 = 4 Ind. Cas. 1089 (1090) = U.B.R. (1909), 4th Qr., Penal Code, 29; R., 21 A. 113 (116) = 18 A W.N. 197; 28 M. 90 (97) = Weir 538 A; 5 C.W.N. 897 (900); 12 C.W.N. 581 = 7 Cr.L.J. 378; L.B.R. (1893—1900) 266; 8 P.L.R. 1904; D., 36 C. 955 = 10 C.L.J. 581 = 14 C.W.N. 82 = 4 Ind. Cas 416.]

In this case the appellant was convicted of offences under ss. 408, 467 and 471 of the Penal Code and sentenced to two years' rigorous imprisonment under s. 408 and a further period of two years under s. 471.

The accused was the servant or agent of certain zemindars named Jadu Nath Roy Chowdhry and Sambhu Chandra Roy, who resided at a place called Taki. The accused lived at Kulna and received a fixed salary, his duty being to look after his masters' cases at Kulna and to pay into the Treasury the land revenue and cesses due in respect of the zemindars' estates.

Amongst these estates were certain properties bearing the *towji* numbers 6/4, 55/1, 149/10 and 166/2, and it was proved from the Collectorate register and witnesses called from the Collecter's office that the revenue due in respect of these zemindaris for the March *kist* of 1893, and the actual amounts paid in respect thereof were the following:—

	Amount of revenue payable. Rs. As. P.	Amount of revenue actually paid. Rs. As. P.
6/4 ...	30 11 9	3 11 9
55/1 ...	386 2 2⅔	5 8 0
149/10 ...	92 2 8	12 2 9
166/2 ...	282 0 0	5 0 0

The system with regard to payment of Government revenue was proved to be the following: The person paying in the money tenders it with two sets of *challans*, one of which is returned to him duly receipted, the other being kept in the Collector's office.

It was proved in evidence that, on the 24th March 1893, Rajoni Kanta Ghose, a *dewan* of Jadu Nath Roy, sent to the accused at Kulna a sum of Rs. 390 in currency notes and Rs. 4-5 by money order, the currency

(1) 5 A. 221. (2) 8 A. 653. (3) 13 B. 515 (note). (4) 11 M. 411.

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notes being contained in a registered letter. The delivery of this letter and the money order to the accused was deposed to by the postal peon, and he was corroborated by the post office registers, and the accused's receipt for them. A post [316] card, dated the 28th March, addressed to Sambhu Chandra Roy, acknowledging the receipt of that letter and the money order which was alleged to be in the handwriting of the accused, was also put in. It was not alleged, on the part of the prosecution, that any specific instructions were sent to the accused as to how he was to apply the Rs. 394-5. A letter, dated the 29th March, also alleged to be in the handwriting of the accused, was also put in evidence. In that letter he stated he had paid the *kist* and enclosed the *challans* (four in number) for his masters' information. The genuineness of both the post card and this letter were denied, but various witnesses deposed to their being in the handwriting of the accused, and their evidence, though disbelieved by the assessors, was accepted by the Sessions Judge. These four *challans*, which were the set returned by the Collectorate office to the person who paid in the money for the March *kist*, and which should have been copies of the *challans* produced from that office, were alleged to be forgeries. They differed from those *challans* in the amounts shown to have been paid in as follows :—

No. of Estate.	Payment shown by genuine *châllans*. Rs. As. P.	Payment shown by the alleged forgeries. Rs. As. P.
6/4	3 11 9	30 11 9
55/1	5 8 0	55 8 0
149/10	12 2 9	92 2 9
166/2	5 0 0	175 0 0

Evidence was adduced to prove that the forged *challans* were in the handwriting of the accused. In June the estate No. 6/4 was advertised for sale for default in payment of the revenue, and on this being brought to the notice of Jadu Nath Roy enquiries were made and the fraud discovered. The fact that the *challans* sent by the accused with the letter of the 29th March were forgeries was clearly proved by comparison of them with the Collector's registers and the other *challans* kept in that office.

The accused pleaded not guilty and called no evidence.

Both assessors acquitted him, their opinion being expressed in the following terms :—

Opinion of the Assessors.

Babu Panchananda Biswas says : I don't find any proof against the accused [317] under s. 408 of the Penal Code, because there is no proof as to the reason for which the money (if sent) was sent to him.

There is no proof against the accused on the other charges.

Q.—Do you believe that the accused wrote the four genuine *challans* ?

A.—I don't believe it, but I have suspicions.

Q.—Do you think he wrote the post card ?

A.—No.

Q.—Do you think he wrote the letter ?

A.—No.

Babu Mathura Nath Chatterjee says : I think the accused is innocent. Looking at the circumstances and the evidence, I think he is innocent.

Q.—What are the circumstances to which you refer ?

A.—The writing in the letter does not tally with the writing in the *challans*.

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The Sessions Judge disagreed with the assessors and convicted the accused on all the charges. The material portion of his judgment was as follows :—

" The assessors both find him not guilty, but, as I have already said, I do not think that they have given their honest opinion on the subject. The guilt of the accused seems to me to be clear. The charges against him are three : (1) One under s. 408 of the Penal Code, that he being entrusted by his master with a sum of Rs. 394-5 committed criminal breach of trust in respect of that sum, *minus* a sum of Rs. 63-6-6. To explain this, it is necessary to say that, besides the sum of Rs. 26-6-6, which the genuine *challans* show that the accused did pay in as land revenue, it is admitted that he also paid in a sum of Rs. 37 for road cess due on the estates. These two sums make up together the sum of Rs. 63-6-6. (2) The second charge against the accused is that he forged the figures and words denoting the sums of money in the four *challans*, Exhibits A. B. C. D. (3) That he fraudulently used the abovementioned *challans*. It is of course proved beyond the shadow of a doubt that the figures and words on the four *challans* were forged by some one or other. A mere perusal of these shows this, and that being so, it is naturally asked why the zemindar and his *dewan* did not notice this at the time that they received the *challans*. The obvious answer to this is that they had no reason to suspect their genuineness. It is only when the forged *challans* were put by the side of the genuine *challans* that suspicion is aroused, otherwise, when the *challans* were for the right amounts, when they bear the seal of the Kulna Treasury, and the initials of the various officials connected with the Treasury (all of which marks are visible on the forged *challans*), I see no reason why the zemindar or the *dewan* should have suspected them. I hold, therefore, that the forged *challans* were in the state **[318]** in which they now are when they were received by the zemindar. The question then is, is there evidence that the *challans* were forged by the accused ? Of course no one saw him forge them, and no one can swear that it was he who brought the *challans* to the Treasury. But there is abundant evidence that all the *challans* are in his handwriting. The witness Srigopal Mitra, a Government official who has no connection whatever with the case, says he thinks so. The *towji-nawis*, Tarini Gupta, swears that the genuine *challans* are in the handwriting of the accused. As to the forged *challans*, he says (very sensibly I think) that he cannot swear as to them, because the writing on them has been written twice, and it is, therefore, difficult to recognise the hand. Rajoni Kanta Ghose swears that the *challans* are in the handwriting of the accused. All these witnesses knew the accused well, and often saw papers purporting to be written by him and swear that they are able to recognise his handwriting. In addition to this, there is the evidence afforded by the accused's own post card and letter, in which he says that he has received the money and paid it into the Treasury. I have therefore not the slightest doubt that it was the accused who wrote the *challans*. It follows, therefore, as a matter of course, that it was he who executed the forgery on the forged *challans*.

" Apart from the direct evidence in this case, the probabilities are all in favour of his guilt. It is not even suggested that there was the slightest enmity between him and the zemindar, and there is therefore no reason whatsoever why the latter should charge him falsely. I shall therefore find the accused guilty on all counts.

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"It is said that he cannot be found guilty of criminal breach of trust for the reason that it is admitted that, when the money was sent to him, no instructions were sent to him as to what he was to do with it. This carelessness on the part of the zemindar, I may here observe, proves very clearly the *bona fides* of his conduct in this case. Had the case been a concocted one we should assuredly find that previous instructions had been given. If, however, we believe that the accused paid only a small amount of the money into the Treasury, and then forged *challans* to show that he had paid a larger amount, it follows as a matter of course that he committed criminal breach of trust. As a matter of fact, the forgery and using the forged documents may simply be regarded as so many links in the chain of evidence to prove the breach of trust.

"The Court concurring with neither of the assessors finds that Lolit Mohan Sarkar is guilty of the offence charged, namely under s. 408, that he committed criminal breach of trust as a servant with respect to a sum of (about) Rs. 330; under s. 467, that he forged the four *challans*, Exhibits A, B, C, D., and under s. 471, that he fraudulently used these *challans* as genuine; and under s. 409 of the Penal Code directs he be rigorously imprisoned for two years, and under s. 471, that he be **[319]** rigorously imprisoned for two years, that is to say, to rigorous imprisonment for four years in all.

No sentence is imposed under s. 467 of the Penal Code."

Against this conviction and sentence the accused appealed to the High Court.

Mr. *Sinha*, for the appellant.

The Officiating Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

The grounds urged on behalf of the appellant for setting aside the conviction appear sufficiently from the judgment of the High Court (BANERJEE and SALE, JJ.) which was as follows :—

JUDGMENT.

The appellant in this case has been convicted by the Sessions Judge of Jessore of offences punishable under ss. 408, 467 and 471 of the Indian Penal Code, and has been sentenced to two years' rigorous imprisonment under s. 408, and to a further term of two years' rigorous imprisonment under s. 471.

It is contended by the learned counsel for the appellant that, as regards the charge under s. 408, there having been no direction to the appellant as to the way in which he was to apply the money that had been remitted to him, and the account between the appellant and his employer being, according to the practice prevailing, adjustable at the end of the year, and it being further in evidence that it was not known whether at the date of the alleged breach of trust the appellant was indebted to his employer, or the reverse, the conviction is not sustainable. As regards the charge under s. 467, the contention is, that there is no evidence to prove the forgery, and further that, as the alleged forgery was committed, not with the intention of causing any wrongful gain, or wrongful loss, or of defrauding any one, but with the intention of screening the past guilt of the accused, it would not come within the definition of forgery in s. 463 of the Indian Penal Code. And, lastly, as to the conviction under s. 471, it is contended that there is no evidence that the accused used the documents in question, nor any that he knew them to be false.

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As to the first contention, that is, the one with reference to [320] the conviction under s. 408, we have had such portions of the evidence as bear upon this part of the case placed before us by the learned counsel for the appellant and heard them commented upon. Though there were no express instructions to the accused as to how he was to appropriate the money that was sent to him, yet bearing in mind the close proximity of the date of the remittance to the last day for the payment of the March instalment of Government revenue, and seeing that the *challans*, as altered, which were sent by the appellant to his employer, and which in their altered state showed the amounts that were really payable as revenue covered very nearly the whole amount remitted, we think it but reasonable to infer that the accused was aware of the implied purpose for which the money had been sent. And as he deposited in the Collectorate a very much smaller amount than that which was remitted, and which he was to have deposited, and tried to pass off the falsely altered *challans* as genuine, we think that there was a dishonest misappropriation of the difference between the amount actually deposited and that shown by the false *challans* to have been deposited sufficient to constitute the offence of which he has been convicted. It is not, as if, instead of appropriating the money to one purpose, he had appropriated it to another, pending the adjustment of accounts between himself and his employer. He had done completely all that was necessary to show that the amount had been duly appropriated to his employer's use by forwarding the altered *challans*, and falsely showing a deposit by him of the larger amount.

As to the charge under s. 467, it is contended that the evidence as to handwriting is not sufficient to show that the accused had committed the forgery himself, that is, with his own hand. No doubt the evidence is not sufficient to show that the forgery had been committed by the accused himself. It is not shown that the alterations in the *challans*, which constitute the forgery, are, like the remainder of their contents, also in the handwriting of the accused; but taking all the circumstances of the case, the receipt of the money by the accused, the deposit by him of the smaller amount and the sending of the *challans* to the employer, showing a deposit of the larger amount, accompanied [321] by a post card, and a letter proved to be in his handwriting, advising the despatch of the *challans* to the employer, it is quite clear that, if the accused did not commit the forgery himself, he must have been an abettor in the commission of it.

We must here consider the argument of the learned counsel that even if, as a matter of fact, the charge of making these alterations in the *challans* had been brought home to the accused, still, as a matter of law, the conviction cannot stand, as the alterations were made, not with the intention of committing a fraud or dishonesty in future, but with the intention of concealing past acts of fraud and dishonesty. In support of the contention two cases were cited, one, that of *Empress of India* v. *Jiwanand* (1), and the other that of *Queen-Empress* v. *Girdhari Lal* (2).

With all respect for the learned Judges who decided those cases, we are not prepared to accept the rule of law laid down by them, that it would not amount to forgery under the Indian Penal Code, if the intention with which a false document was made was to conceal a fraud which had been previously committed. If the intention with which a

(1) 5 A. 221. (2) 8 A. 653.

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false document was made was to conceal a fraudulent or dishonest act which had been previously committed, we fail to see how that intention could be other than an intention to commit fraud; and if the intention was to commit fraud, the making of a false document with that intention will come within the definition of forgery in s. 463 of the Indian Penal Code. Nor does s. 464 stand in the way of the view we have taken; for though to constitute forgery a person must make a false document, as defined in s. 464, a person makes a false document "who dishonestly or fraudulently makes, signs, seals or executes a document, or a part of a document, &c.," so that, if there is either dishonesty or fraud in the making or altering of a document, falsely, the case would come under s. 464.

We are asked to hold that "fraudulently" here means the same thing as "dishonestly;" and that if the intention was not to cause any wrongful gain or any wrongful loss in future, but merely to screen a past offence of the offender, or, in other words, if this dishonesty, that is, the causing of wrongful gain or **[322]** wrongful loss, was a thing of the past at the date when the false document was made, the case would not come under s. 464. But quite apart from the question, whether, even though the wrongful gain or wrongful loss may be a thing of the past at the date of the making of a false document, the making of the same should not yet be regarded as dishonest, we think the word "fraudulently" must mean something different from "dishonestly." It must be taken to mean as defined in s. 25 of the Penal Code "with intent to defraud," and this was the view taken by the Bombay High Court in the case of *Queen-Empress* v. *Vithal Narain Joshi* (1). We are of opinion, therefore, that the forgery in this case, for the abetment of which alone, upon the evidence adduced, it would be safe to convict the appellant, was sufficiently constituted by the alterations in the *challans*. The view that the making of a false document under circumstances, such as those under which the false *challans* in this case were made does amount to forgery, is fully supported by the decision of the Madras High Court in the case of *Queen-Empress* v. *Sabapati* (2).

As to the conviction under s. 471 we have been asked to hold that there is no evidence that the appellant used the false document, and that there is no evidence of his guilty knowledge. From what we have already said, it is clear that he must have had guilty knowledge. For the money came to him, he acknowledged receipt of it in the post card which he sent, he deposited a much smaller amount as shown by the *challans* he wrote and filed in the Collectorate, and then he sent the falsely altered duplicate *challans* to his employer. The letter written by him, which followed the post card, clearly shows that he used the *challans*. It was contended that the evidence to show that the post card and the letter were in the handwriting of the accused is extremely meagre. We do not think that there is much force in this contention. There is the employer of the appellant, Jadu Nath Roy Chowdhry, there is his *dewan*, Rajoni Kanta Ghose, and there is also an Amla of the Collectorate, Tarini Charn Das Gupta, who say that the post card and the letter are in the **[323]** handwriting of the accused. All of them do not say that they have seen the accused write, but they say that in the course of business they have seen his handwriting; and viewing the matter in the way in which such matters ought to be viewed by reasonable men, we do not think it would be right to hold that this evidence does not prove that the post card and the letter were

(1) 13 B. 515 (note). (2) 11 M. 411.

in the handwriting of the accused. We think that the evidence adduced in this case proves beyond all reasonable doubt that the accused used the false *challans*; and used them with guilty knowledge. He has made no defence, he has simply said in his examination that he is not guilty. It is suggested by the learned Counsel for the appellant that, possibly, if any offence has been committed, it might have been committed by the son of the accused, who is deposed to by one of the witnesses for the prosecution as being a young man of bad character, and who sometimes goes to the Treasury, and if that was so, the accused could not have made out his defence, as circumstances that might go to exculpate him, would go to incriminate his son.

This is a bare supposition. No sufficient foundation has been laid in fact for any reasonable inference, or even suspicion, that the forgery of the documents which passed through the hands of the accused might have been the doing of his son without his knowledge. To give effect to such a conjecture would not be following the sound rule which requires us to give the accused the benefit of a reasonable doubt, but would be allowing speculation to take the place of evidence.

For all these reasons, we think that the conviction with the sole modification that we have indicated above, with regard to the charge of forgery, must stand. With regard to the question of sentence, we think that as the offences of criminal breach of trust, forgery, and using as genuine a forged document, are in this case intimately connected with one another, and form parts of one connected transaction, it will be sufficient for the ends of justice if we confirm the sentence of two years' rigorous imprisonment for the offence of criminal breach of trust, and reduce the sentence for the offence under s. 471 to rigorous imprisonment for one year.

[324] It remains now to say one word with reference to the remarks of the learned Judge on the conduct of the assessors in this case. The learned Judge observes in his judgment in two places that the assessors have not given their honest opinion in this case. We do not think that this remark was warranted by the mere fact of the assessors having been of opinion that the accused was innocent. That opinion, no doubt, was an erroneous one. The assessors were certainly wrong in their judgment when they said that the guilt of the accused had not been made out. But between error of judgment, however gross, and moral obliquity, the difference is wide, and a Judge must have very strong reasons before he can be justified in making remarks impugning the moral character of persons associated with him in the trial of cases. We think it due to the gentlemen who acted as assessors in this case that we should say that much as we condemn their judgment, we see no reason to condemn their character for honesty.

H. T. H. *Conviction upheld.*

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PRESENT:

Lords Halsbury, Hobhouse, Shand and Davey, and Sir R. Couch.

[*On appeal from the Chief Court of the Punjab.*]

SAYAD MUHAMMAD (*Plaintiff*) *v.* FATTEH MUHAMMAD AND OTHERS (*Defendants.*) [1st, 2nd & 6th November, 1894.]

Pleadings—Object of pleadings—Issue not in terms fixed, but afterwards raised—Appointment of the religious superior of a Mahomedan institution—Custom as to such appointment—Undue influence how indicated.

The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued, in order that each may bring forward evidence appropriate to the issues.

The claim here made was that the last preceding sajjadanashin, acting according to the custom of the institution of which he was the religious superior and manager, had appointed the plaintiff to succeed him on his decease. The finding of the first Court that he had this power, by the custom, was affirmed on this appeal.

As to the fact of the appointment, it was not apparent at what stage of the suit the question had first been raised whether the deceased had been of [325] sound and disposing mind at the time of making it. The first Court found that he had been of sound mind at the time; but the Chief Court on appeal reversed this finding, and added that he had been, in their opinion, unduly influenced. As these questions, though not formally stated in the issues, had been sufficiently open upon the proceedings to give to each Court a right to form a judgment upon them, the Judicial Committee decided which was correct; and affirmed the finding of the first Court as to the soundness of mind of the deceased.

Upon the question of undue influence, which was an issue different from that of the mental capacity of the deceased in appointing, their Lordships found no evidence of either coercion or fraud, under which such influence must range itself, citing *Boyse* v. *Rossborough* (1). They found no evidence of the exercise of any influence. The decision of the Chief Court was, therefore, reversed; and the decree of the first Court, in favour of the plaintiff, was maintained.

[Rel., 15 Ind. Cas 757 (759) = 5 S.L.R. 192; R., 28 B. 153 (161) = 5 Bom.L.R. 892 (895); 36 B. 308 (313) = 14 Bom.L.R. 120 = 14 Ind. Cas. 469; 3 Bom.L.R. 535 (537); 11 O.C. 102 (107) (B).]

APPEAL from a decree (10th April 1890) of the Chief Court, reversing a decree (28th April 1888) of the District Judge of Montgomery.

This suit asserted the plaintiff's right to the sajjadanashini, or headship, of an ancient khangah, or Mahomedan religious establishment at Pak Pattan in the Montgomery District, valued, with the property attached thereto, at a lakh and a half of rupees. This was dedicated several centuries ago, in memory of its founder Baba Farid-ud-din, whose tomb was there. The principal questions were: First, whether the recently deceased sajjadanashin, who managed the institution, had the right of appointing in his lifetime a person to be his successor, who might be chosen by him from among the founder's kindred, excluding another nearer kinsman, upon whom the headship and management would otherwise have devolved. Secondly, whether, as a fact, the plaintiff had been appointed by the deceased, who was paralytic, while the latter was still of disposing mind and capable of such an act.

The appellant, then aged eleven years, brought his suit on the 25th May 1886, by his next friend, and as a pauper (s. 401 of the Code of Civil

(1) 6 H.L.C. 1 (49).

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Procedure), claiming to be declared the duly appointed sajjadanashin, and to have a decree for the possession of the village lands, buildings, and moveable property scheduled with the plaint. The main ground of his title was his alleged nomination by the [326] preceding gaddinashin, the Diwan Pir Alla Jowaya, deceased, on the 24th December 1884, of whom he was the grandson, being the son of the Diwan's daughter. The defendant was Abdul Rahman, uncle of the deceased Diwan, and his nearest agnatic relation. This defendant, on the fourth day after the death of the late Diwan, obtained possession of the gaddi, and the properties of the institution. The parties were of the chishti kaum, or tribe, and were described as descended from Baba Farid-ud-din, Shakarganj, (name of the sugar market), after whom, down to the Diwan Alla Jowaya, there had been twenty-three occupants of the gaddi which the latter had occupied for forty years. It was alleged that he, having no son, had appointed to be his successor his daughter's son, whom he had associated with himself for some months before his death. It was also alleged that this appointment was attested in a document, filed with the plaint, purporting as follows :—

" Deed of adoption executed by Diwan Sheikh Pir Alla Jowaya on 29th July 1884, corresponding to 5th Shawal 1301 Hijri.

" I, Diwan Sheikh Pir Alla Jowaya, son of Sheikh Qutb Din, caste chishti, sajjadanashin of Pak Pattan, do hereby declare that as my son Sheikh Muhammad Akbar has died by the will of God, and I am left sonless, and as this transitory life is unstable, I, while in the enjoyment of my right senses, have adopted Sheikh Sayad Muhammad, son of Sheikh Fatteh Muhammad, my own daughter's son, and have associated him with me, and have with my own hand performed the ceremony of dastarbandi (putting on turban) in token of my adopting him as my son in presence of respectable persons of the town of Pak Pattan. The aforesaid Sheikh Sayad Muhammad is thus made my heir and owner of my property. After my death the entire property, moveable and immoveable, and the sajjadanashini of the holy shrine of Kutab-ul-Aktab, Farid-ul-bar-wal-Bahr Hazrat Baba Farid-ud-din, Masud Ganj Shakkar (may God throw light on his tomb), together with the property attached to the above sajjadanashini, shall belong to the above adopted son. I have already executed a will for the maintenance and other expenses of my wives. According to that will my wives shall remain in possession of the property noted therein during their lifetime, and no one shall interfere with that arrangement. It will be incumbent on my adopted son to dutifully render service to my wives, and thus obtain a reward in both worlds. After their deaths their property specified in the will shall be inherited and owned by my aforesaid adopted son, and no relative and heir of mine shall have any claim to it. These few lines have therefore been written by way of a deed of adoption, in order that it may serve as an authority.

[327] " Dated 29th day of July 1884, corresponding to 5th Shawal 1301 H. Written by Ghulam Mohy-ud-din, Kazi.

Seal of Diwan Sheikh Pir Alla Jowaya,
Sajjadanashin, executant of the deed."

This bore the signatures or seals of forty-three witnesses, residents of Pak Pattan and neighbouring places.

The defence of the principal defendant, Abdul Rahman, was that there had been no appointment of the plaintiff to be sajjadanashin, and

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that the deceased Diwan had no right to appoint a successor, or power to alienate property belonging to the endowment. It was also part of the defence that no right of inheritance passed by the alleged adoption of Sayad Muhammad.

The plaintiff, however, did not long insist on the assertion of a title by adoption. This was abandoned, it being admitted that no right of succession, as a consequence of adoption by the deceased, could be supported by Mahomedan law. The plaintiff took his stand on the custom of the institution to give each sajjadanashin the power to appoint his successor, within certain limits of kinship to the founder.

In the District Court several issues were fixed, of which some were no longer in dispute when the appeal to the Chief Court was filed. Those that remained material were to this effect: 1st, whether the late Diwan was empowered by the custom of the institution to appoint his successor; 2nd, whether there was upon this power, if exerciseable, any restriction, limiting the choice to agnatic descendants of the founder, and preventing preference by the appointing superior of a more remote kinsman over a nearer one, or of a descendant through a female over one in the male line; 3rd, whether the late Diwan had effected the appointment of the plaintiff.

The District Judge, the Deputy Commissioner of the District, as to the customary authority of the sajjadanashin of this and other similar institutions examined, among many other witnesses, seven from Haiderabad in the Deccan.

In regard to the late Diwan's power to appoint his successor the Judge referred to a printed copy on the file of a book called the "Jowahir Faridi" professing to record chishti customs in [328] respect of this institution. This had been printed in 1884, and there was a manuscript copy of the book on the file written in the Hijri year 1172 (A. D. 1755). The printer was called, and stated the accuracy of the printed copy, and the source of the manuscript supplied by the late Diwan. Witnesses on both sides declared this to be trustworthy. The manuscript was written in Persian. The Judge understood the meaning of the passages cited, which he partly transcribed in his judgment, giving the translation here and there. He found that the extracts showed clearly that the succession to the headship was regulated by the spiritual head for the time being. He also recorded oral evidence to the same effect. On this, he decided that there was no reasonable doubt that "Jowahir Faridi" was "an authoritative compendium of the history and customs of the descendants of Baba Farid, who had held the office of Diwan of the Pak Pattan shrine." Other books were also referred to.

In support of the probability that the custom should exist reference was made to the authorities indicating that a mutwali might entrust in his last illness the tauliyat to another person. The Judge found that the late Diwan, having the right to pass over a nearer collateral relation in favour of another whom he might select, had appointed the plaintiff. Long before the nomination of the latter, the Diwan had expressed his intention to the Haiderabad group of witnesses of appointing his grandson, if he should be directed, by the spirit of Baba Farid-ud-din, so to do. The nature of a paralytic seizure from which the Diwan had suffered was considered, and the Judge's conclusion was thus stated:—

"There is evidence on the record that long before the nomination was made, the Diwan had expressed his intention to make it; that he was attached to his grandson; and that he was averse to Abdul Rahman. After

considering the evidence, I think that the defendants have failed to prove that, when the nomination was made, the Diwan's mental faculties were impaired, or that he was unable to know what he was doing, or that he made it otherwise than of his own free will. That the nomination was made is clear from the deed of nomination for the dastarbandi ceremony, in which the plaintiff was invested with the pagri, with appropriate rites and ceremonies; from the entry made in the due course of business by Mohan Lal, patwari, in his diary, dated 30th July 1884; from the evidence of several witnesses [329] who proved that, after the nomination, the boy, Sayad Muhammad, was continually associated with the Diwan, and went with him to the opening of the "gate of Paradise" ceremony in October 1884; and by the fact that, after the dastarbandi ceremony, various letters were sent to the leading supporters of the shrine announcing the fact, and congratulatory messages were received from them. If, as I have held, the Diwan was in possession of his faculties when the nomination was made, it is not unreasonable to suppose that he was fully aware of, and acquiesced in, the measures taken to make the nomination widely known. On the evidence, then, I decide that the late gaddinashin did appoint the plaintiff, Sayad Muhammad, as his successor to the gaddi."

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On appeal to the Chief Court, the decree in favour of the plaintiff, which followed the above judgment, was reversed, and the suit was dismissed. This was on the ground that the late Diwan, (although, so far as the execution of the document of the 29th July 1884 went, he had executed it) was not, at the time, capable of the volition, or judgment, required by the act of nominating a successor to take the place of the person who would otherwise obtain the succession. The Judges were unable to find that he was capable of realizing that, by diverting the succession, he was doing an act which would almost certainly lead to strife and litigation, but yet resolved on incurring these evils for reasons which he considered sound. They were further unable to feel satisfied that "he came to this resolution unbiassed by undue influence." They could not say affirmatively that he appointed the plaintiff his successor when he was in full possession of his faculties, and free from the influence of those about him who wished that the plaintiff should succeed him.

Whilst the appeal to the Privy Council was pending Abdul Rahman died, and Fatteh Muhammad, his son and heir, was put upon the record as respondent in his father's place.

On this appeal,—

Mr. *M. Crackanthorpe*, *Q. C.*, and Mr. *Theodore Ribton*, argued that the decree of the Chief Court should be reversed. The fact of the document having been executed, attesting the nomination having been established to the satisfaction of the Chief Court, and that Court having based its judgment on the state of the Diwan's mind, it was necessary, if that judgment could be supported, that there should have been evidence, (and to produce that evidence would properly have been incumbent [330] on the defence) that the Diwan's faculties had been impaired to such a degree that he could not nominate his successor. This had not been shown at all; and as the whole evidence was now upon the record, irrespectively of the *onus* of proof, the result was that strictly according to that evidence the Diwan's ability to nominate had been shown to have remained, notwithstanding the paralysis which had affected one-half of his body. Reference was made to the medical evidence on the record, and to that of witnesses who were about the Diwan during the last few months of his life, as well as to that of witnesses to the act of

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appointment. It was argued that the judgment of the District Judge was correct, both as to the authority of the Diwan to appoint, and as to his competence to select his successor, within the permitted limits. The defence of undue influence had not, at any stage of the proceedings, been distinctly raised. The burden of sustaining this defence was altogether upon the defendants; and it was in no way necessary for the plaintiff to give evidence in disproof of it. There was no evidence whatever of undue influence on the part of any one over the Diwan. Of the reasons given in the judgment of the Chief Court for their conclusion, those which were drawn from the tahsildar's refusal to register the document of 29th July 1884, and from the absence of any application to the Deputy Commissioner to hold an inquiry as to the state of mind of the Diwan, were derived under a mistaken view. The document did not require registration, and it was by no means a clear probability that the Deputy Commissioner would have interfered.

Mr. *R. V. Doyne*, for the respondent argued that the judgment of the Chief Court was right on its result. The document of the 29th July 1884 was, on its true construction, not an attestation of the exercise of a power by the Diwan to appoint a successor, but was a declaration that an adoption had taken place. If, moreover, the finding was right that the document was duly executed by the Diwan, and if he had authority to nominate his successor, still it was open to question whether it was possible to consider that document to be evidence of such a nomination. It amounted to nothing more than an assertion of an attempt to adopt—an impossibility on the Diwan's part, according to Mahomedan law; an attempt to do an act by which no right of succession **[331]** would arise. Adoption failing, the document had no operation to confer a right. On the other hand, there was no doubt that on the 27th December 1884, the late defendant Abdul Rahman had obtained possession of the gaddi, with the approbation of the general body of the worshippers at this khangah. In regard to the main dispute in this case, the Diwan's state of mind at the time of the alleged appointment, it was argued that the Diwan was not in the full possession of his senses and faculties, and was not free from undue influence, or from liability to be unduly influenced, at the time when he was alleged to have made the appointment. Also the evidence had not proved a custom empowering the Diwan to appoint his successor.

Counsel for the appellant were not called upon to reply.

JUDGMENT.

Afterwards, on the 6th November, their Lordships' judgment was delivered by

LORD HALSBURY.—This is an appeal against a judgment of the Chief Court of the Punjab, reversing a judgment of the District Judge of Montgomery, by which it had been ordered that the appellant, who was the plaintiff in the suit, should be appointed gaddinashin of the shrine of Baba Farid Shakarganj, and should get possession of certain property attached thereto.

The forms of procedure in the suit are not very clearly stated, but their Lordships think it must be assumed that the questions which have been in debate before them were in debate before both the Courts below. It does not quite appear at what period of the suit the question of the sound disposing mind of the Diwan, Pir Alla Jowaya, was raised, nor is it very material, excepting in one aspect. Whatever system of pleading may exist,

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the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues; and it may perhaps not be altogether immaterial to observe that the question of the capacity of the Diwan does not appear to have been prominently raised, at all events in the first instance. Their Lordships are, however, of opinion that they must assume that the question of his capacity was open upon the proceedings sufficiently to give each Court below the right to form a judgment [332] upon the matter. The question is, which of those judgments is right?

The decision of this appeal turns really upon two questions of fact. The first question is, the right of the Diwan to appoint his successor in his lifetime, according to the custom of the worshippers of the shrine. On behalf of the defendant Abdul Rahman, the father of the first and second respondents, it was contended that there was no proof of the alleged custom, and that the general Mahomedan law would carry to the defendant, as the nearest agnate, the right to occupy the gaddi. For the plaintiff it was said that the only question was whether or not the custom of the shrine permitted the Diwan to appoint anyone within certain limits, and whether he did in fact appoint the plaintiff. That is a question to be determined by the evidence applicable to the custom, and their Lordships are of opinion that the evidence overwhelmingly establishes the right of the Diwan to appoint, within certain limits, within which limits the plaintiff was, inasmuch as he was both an agnate and a worshipper. Their Lordships think that the right so to appoint is established both by documentary evidence and by the history of the shrine itself, and conspicuously in the case of the Diwan himself, seeing that it has been proved that he was not the person who would have succeeded to the office of gaddinashin according to the Mahomedan law. The evidence which was produced on the other side does not appear to their Lordships to be either as valuable, or indeed as consistent with itself, as either the documentary evidence in favour of the right to appoint, or as the evidence in fact. In truth the witnesses for the defendant seem to alternate between a strict application of the Mahomedan law of succession to realty, and a sort of popular choice which must be ascertained by the wishes of the worshippers. In that state of things it is impossible to give the same effect to the latter evidence as to the coherent and perfectly reasonable evidence given for the plaintiff.

Assuming therefore that it was within the power of the Diwan to exercise the power of appointing a successor within certain limits, and that the plaintiff was within those limits, the next question is, whether he in fact appointed the plaintiff. The first event in order of date was an expression made by the Diwan, about [333] the year 1882, that he intended to appoint the plaintiff as his successor. He so expressed himself two years before he actually made the appointment The evidence on this point was not credited by the Judges of the Chief Court, but their Lordships are wholly unable to understand upon what ground they rejected it. The evidence that the Diwan did so express himself was given by persons against whom no imputation was made, and the sole ground, so far as their Lordships can see, for the rejection of the evidence was because in his will, made in 1884, he expressed a hope that he might yet be granted a son of his own. That would seem to be a wholly inadequate reason for disbelieving the evidence of persons who stated in the plainest possible terms that the Diwan had expressed his intention to appoint his daughter's son as his successor, if he had a revelation.

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Their Lordships are then brought to the question of the actual appointment. The appointment is said by two witnesses to have been made in their presence. If the matter had remained entirely upon that state of the evidence, and nothing had been done afterwards, some observations which are made by the Chief Court perhaps might have some force in them, but it is a mistake to look at each part of this evidence as if it were to be taken only by itself. The evidence of the deed of appointment itself is very powerful evidence that something had previously taken place. Mr. Doyne, indeed, strenuously contended that the deed was only intended to have reference to something that was yet to be done. But he was met by the fact that the deed speaks throughout in the past tense of something which had already been done. He then ingeniously suggested that the deed did not really intend to appoint a successor, but was something in the nature of an adoption of a son. The answer appears to be very manifest upon the deed itself. It uses phraseology which is only applicable to the appointment of a successor. It is not a deed purporting to make the appointment, but witnessing and testifying to the fact that the appointment had already been made. Therefore, if their Lordships should ultimately come to the conclusion that the deed was executed by the Diwan when in his right mind, it is about the strongest possible evidence that could be given in confirmation **[334]** of the evidence of those persons who alleged that an appointment had previously, in their presence, been in fact made.

That brings their Lordships to the question which is really the only question that has been substantially argued for the respondents, namely, whether the Diwan, when he executed the deed, was in a state of mind capable of appreciating the nature of the act that he was performing. There are some witnesses who say that the Diwan was senseless, that he did not know what he was doing, that he was wholly incapable of managing himself or his concerns. On the other hand, there are several witnesses who give exactly contrary evidence. In that condition of things, without proceeding to the extreme length of assuming that one side or the other were committing perjury, their Lordships prefer to look about to see, not perhaps whether it is possible to reconcile in a reasonable way the extreme views of each set of witnesses, but whether there are not some circumstances which may account for differences of opinion, and honest differences of opinion, on the matters on which the witnesses have given evidence.

Now the undoubted fact is that the Diwan was suffering from paralysis. It is equally certain that he was affected by difficulties of speech which sometimes attend that disease. Their Lordships think it very likely, in that condition of things, that there would be differences of opinion as to the extent and degree of intelligence that he exhibited. But this is certain, that the execution of the deed was not a thing done in a corner, that the fact that the Diwan was alleged by some people to be about to make a deed declaratory of his already having made an appointment of a successor was known in the village, and that there were many people who were anxious to insist upon the right of Abdul Rahman, the uncle of the plaintiff, to succeed, and were consequently anxious that the Diwan should not execute the deed. Accordingly a number of persons, a sort of deputation, came to him, and endeavoured to persuade him not to execute the instrument which it was supposed he was about to execute, for the purpose of establishing his grandson's rights. There can hardly be a more forcible argument in a matter of this kind, than to see,

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not what people say at a considerable distance of time [335] after the events have happened, but what their conduct was at the time, to see the hypothesis upon which they were there, and what they were doing; and in this view, it is impossible not to be struck by this, that in the transaction to which the different witnesses speak, it seems to be assumed on both sides that the Diwan was open to persuasion, but that, if he would insist upon executing the deed, the party who supported the claims of the uncle could not help it, and that although some of them remonstrated against his doing so, and were anxious that he should not do so because it would give rise to dispute, yet they were so satisfied that he was exercising his own will on the subject, and that it was his will which was being followed in the execution of the instrument and the attaching of the seals, that when they failed to succeed in making him abstain, they actually, many of them, attached their seals in verification of the execution of the document.

The narrative then proceeds with the authority given by the Diwan for the registration of the deed, the application to the Sub-Registrar to register it, the opposition of Abdul Rahman's party, and the refusal of the Sub-Registrar to register it. The Chief Court placed great reliance on the fact that the plaintiff did not appeal to the Registrar against the refusal by the Sub-Registrar to register the deed. But it is admitted now that it did not require registration, and if the plaintiff was so advised, that would be a sufficient reason for taking no further steps. In truth, however, the whole proceeding before the Sub-Registrar was irregular, that officer having no such power under the Registration Act as he seems to have assumed.

As regards the condition of the Diwan after the execution of the deed, there is the evidence of Rup Singh, a sergeant of police, who was sent for by the Diwan to his kacheri, and who speaks to a conversation which took place between the Diwan and himself, and says that the Diwan was in his right senses. Mr. Doyne says the sergeant is not to be believed because he said that the plaintiff was turned out of the kacheri by the defendant's party, whereas Mr. Doyne contends that the plaintiff was not turned out, and that the criminal proceedings brought by him against the [336] defendant, in respect of his alleged ejection, were unsuccessful. Their Lordships think that this contention is a little overstrained, because, on looking at the judgment of the District Judge, they observe that the ground on which the criminal proceedings failed was, not because the plaintiff was not forcibly turned out of the property, but because the Indian Penal Code lays down that the violence must be "with intent to commit an offence, or to intimidate, insult, or annoy, any person in possession of such property," and that it was not a case of that kind.

On the whole it seems to their Lordships that the result of the evidence is as follows: That there is a considerable body of affirmative evidence which establishes capacity on the part of the Diwan, and that the evidence on the other side is reconcileable with exaggeration or mistake, or the absence of any testing of the real state of the Diwan's mind on the various occasions to which the witnesses for the defence speak; for it is to be observed that in speaking of the occasions on which they say they went to see the Diwan, nothing could be more loose than their evidence, inasmuch as they give no particulars of any specific interview with the Diwan, but say generally that he did not know what he was about.

Under these circumstances their Lordships are of the clear opinion that the evidence establishes sufficiently that the Diwan was in a state of

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mind which showed that he knew what he was doing, and that the act which he did was one which he intended to do, and that he was capable of understanding the nature and consequences of the act which he had done.

The Chief Court appear to their Lordships to have mixed up the questions of undue influence and incapacity. They are totally different issues. So far as the question of undue influence is concerned, there does not appear to be a particle of evidence of any influence of any sort exercised towards the Diwan on the part of the plaintiff or his supporters. The question of what is undue influence is sometimes a difficult one. Lord Cranworth, when giving judgment in the House of Lords in the case of *Boyse* v. *Rossborough* (1) gives this definition : "It is sufficient to say that allowing a fair latitude of construction, they must [337] arrange themselves under one or other of these heads, coercion or fraud." It is enough in this case to say that there is not a particle of evidence of either coercion or fraud, or indeed of any influence of any sort or kind exercised on the Diwan by the plaintiff.

Their Lordships will for these reasons humbly recommend to Her Majesty that the decree of the Chief Court ought to be reversed, that the appeal to the Chief Court ought to be dismissed with costs, that the decree of the District Judge ought to be varied by declaring that the plaintiff was duly appointed to the office of gaddinashin of the shrine of Baba Farid Shakarganj by the late Diwan, Pir Alla Jowaya, and was entitled to possession of the property attached thereto from the date of the death of the said Pir Alla Jowaya, and that the said decree ought to be affirmed in other respects.

The first and second respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant : Messrs. *Hughes & Sons.*
Solicitors for the respondent : Messrs. *T. L. Wilson & Co.*

C. B.

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APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

PROFULLAH CHUNDER BOSE AND OTHERS, MINORS, BY THEIR MOTHER SURBOMONGALA DASI AND GRANDMOTHER TRIPURA SUNDARI DASI (*Plaintiffs*) *v.* SAMIRUDDIN MONDUL (*Defendant*).*
[19th December, 1894.]

Bengal Tenancy Act (VIII of 1885*), ss.* 15, 16—*Operation of those sections in a suit for rent of land to which the plaintiff succeeded before the Bengal Tenancy Act came into force.*

Sections 15 and 16 of the Bengal Tenancy Act are not retrospective.

THIS was a suit for arrears of rent for the years 1297 (1890) of what the plaintiffs (who were minors) alleged was a permanent [338] tenure. The grounds of defence were that the relationship of landlord and tenant

* Appeal from Appellate Decree, No. 252 of 1894, against the decree of T. D. Beighton, Esq., District Judge of 24 Parganas, dated the 5th of December 1893, reversing the decree of Babu Nogendra Nath Roy, Munsif of Barasat, dated the 11th of March 1893.

(1) 6 H.L.C. 1 (49).

did not exist between the plaintiffs and defendant; and that the suit was not maintainable, as no notice of the plaintiffs' succession had been given to the Collector, and no road cess papers filed in the Collectorate in accordance with the provisions of ss. 15 and 16 of the Bengal Tenancy Act; and these grounds raised the only two issues in the case.

The Munsif found that the defendant was the plaintiffs' tenant, and as to the second issue said :—

"Defendant, after the examination of witnesses, has taken objection that plaintiffs should have given notice of their succession to the Collector, under s. 15 of the Tenancy Act. But it appears that the mother of the minors holds a certificate of guardianship. The objection taken by defendant cannot now be entertained."

The Munsif gave the plaintiffs a decree.

The District Judge on appeal said :—

"I am of opinion that this suit for rent must fail. The plaintiffs are minors, and they succeeded to a permanent tenure, in respect of which this suit has been brought, in 1291 (1884), when their father died. Under ss. 15 and 16 of the Tenancy Act, no person entitled to a permanent tenure by succession can recover rent in respect of the tenure until notice of succession has been given to the Collector and the fee paid. It appears to make no difference whatever that succession opened out before the passing of the Tenancy Act. Nor will it assist the plaintiffs that they are represented by their mother who is their certificated guardian."

The Judge therefore reversed the decision of the Munsif, and dismissed the suit.

From this decision the plaintiffs appealed to the High Court, on the grounds that the Judge was in error in applying to the case the provisions of ss. 15 and 16 of the Bengal Tenancy Act, and that the plaintiffs, having succeeded to the tenure before that Act came into operation, were not bound to have recourse to the provisions of ss. 15 and 16 of the Act to entitle them to sue for rent.

Babu *Saroda Churn Mitter* and Babu *Hara Coomar Mitter*, for the appellant.

Babu *Moheen Chand Mitter*, for the respondent.

The judgment of the Court (O' KINEALY and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

[339] This is an appeal from the decision of the District Judge of the 24-Parganas, dated the 5th of December 1893, reversing a decision of the second Munsif of that district, dated the 11th of March 1893.

The plaintiff in this case sued for rent, and at the hearing it appeared that the succession had opened out to him long before the Tenancy Act came into operation. The question is whether ss. 15 and 16 of the Tenancy Act apply to this case, so as to affect him. Section 16 certainly takes away a substantial right; and if we interpreted ss. 13 and 14 in the same manner as the Judge in the Court below has interpreted ss. 15 and 16, we should arrive at a most unreasonable conclusion. We think the sections have not retrospective effect.

The order of the lower Court is set aside, and the case remanded to the District Judge in order that he may try it on the merits.

The respondent will be entitled to the costs of this appeal.

J. V. W. *Appeal allowed.*

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APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

BABU LAL (*One of the Defendants*) *v.* NANKU RAM AND ANOTHER (*Plaintiffs*).* [27th February, 1894.]

Hindu law - Inheritance—Sapindas—Bandhus—Mitakshara law—Descendants in third degree from common ancestor—Second cousins.

The plaintiffs were descended in the third degree from *M* who was *R's* maternal great-grandfather, and *R* was descended in the third degree from *M* who was the plaintiffs' maternal great-grandfather. *Held*, with reference to the definition of *bandhu* and *sapinda* in the Mitakshara (by which school of Hindu law the parties were governed) that the plaintiffs were *R's sapindas* through his mother, and *R* was the plaintiffs' *sapinda* directly; and being thus mutually related as *sapindas*, the plaintiffs were heritable *sapindas* and *bandhus* of *R*, *ex parte materna*, and on his death without issue were entitled to his property as his heirs.

[R., 17 A. 523 (524) = 15 A.W.N. 117; 19 A. 215 (225) (F.B.); 23 M. 123 (125); 2 Bom. L. R. 842; 6 C.L.J. 190 (201).]

[340] THIS suit was brought to recover two one-third shares of certain immoveable property with mesne profits.

The plaintiffs alleged that the property in suit belonged to one Ram Saran Ram, who died in 1292 (1885) without issue; that after his death they and their brother Ram Churn, the second defendant, became entitled to the property as Ram Saran's heirs; but that they were dispossessed by the first defendant Babu Lal, who was a purchaser of the property from the second defendant, who claimed the property under a gift (which the plaintiffs alleged to be collusive) from one Dolia, the maternal aunt of Ram Saran. The parties were governed by the Mitakshara law.

The suit was contested by the first defendant (the second defendant not appearing), who set up the defence, the only one material to this report, that the plaintiffs were not the heirs of the deceased Ram Saran.

The Subordinate Judge found in favour of the plaintiffs' case. He said :—

" Weighing the whole evidence and probabilities of the case, I am of opinion that the plaintiffs' genealogical tree or allegation of relationship is correct. As such they (plaintiffs) are the near *bandhus* of Ram Saran, who had left no other near agnate or cognate. Even according to the defendants' genealogical tree the plaintiffs, who are three degrees removed from the common ancestor Mangru Ram, will under the Mitakshara be the heritable *bandhus* of Ram Saran."

On appeal by the defendant the Judge found the relationship between the parties to be according to the following genealogical tree :—

Mangru Ram
- Hardoyal Ram
  - Musst. Sonia
    - Nanku Ram, Plaintiff No. 1
    - Chalhan Ram, Plaintiff No. 2
    - Ram Saran Ram, Defendant No. 2
- Musst. Anandi
  - Musst. Keola
    - Ram Saran Ram, (*Propositus.*)

* Appeal from Appellate Decree, No. 1942 of 1891, against the decree of G. G. Dey, Esq., Officiating District Judge of Shahabad, dated the 17th of August 1892, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that district, dated the 3rd of December 1891.

[341] He said :—

"Then, are the plaintiffs as son's daughter's sons of Mangru Ram, who was the mother's mother's father of Ram Saran, legal heirs of Ram Saran in the absence of nearer kin ?

"The appellant contends that they do not come within the list of heritable *bandhus*, and refers to the pedigree given in s. 465 of Mayne's Hindu Law of '*Bandhus ex parte materna* in which this relationship is not found. But it is explained in s. 466 that this list is a collection of examples specifically mentioned in different commentaries and not an exhaustive list. From the more elaborate definitions of heritable *bandhus* given in Raj Kumar Sarvadhikari's Tagore Law Lectures of 1880, pp. 703, 705, &c., I conclude that the plaintiffs come within that category, as being cognate *sapindas* within four degrees, counting from the mother's maternal grandfather of Ram Saran (see p. 705), and that they are consequently legal heirs."

The Judge upheld the decree of the Subordinate Judge.

The first defendant appealed to the High Court on grounds which, as well as the authorities cited, are sufficiently referred to in the judgment of that Court.

Mr. *C. Gregory* and Babu *Karuna Sindhu Mukerjee*, for the appellant.

Dr. *Troylokya Nath Mitter* and Babu *Makhun Lal*, for the respondents.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiffs, respondents, for possession of two-thirds of two houses with mesne profits, on the allegation that the houses belonged to one Ram Saran Ram ; that on Ram Saran Ram's death the two plaintiffs and their brother defendant No. 2, as Ram Saran Ram's mother's sister's sons and his nearest heirs, became entitled to the same in equal shares ; and that defendant No. 1, setting up a purchase from defendant No. 2, has been keeping the plaintiffs out of possession of their two-thirds share.

Defendant No. 2 did not enter appearance, but defendant [342] No. 1 defended the suit, urging, among other matters, not necessary now to consider, that the plaintiffs were not the heirs of Ram Saran Ram ; that they were not related to him as they alleged, their mother Sonia and Ram Saran Ram's mother Keola not being sisters, but being cousins, that is, daughters respectively of one Hardoyal and his sister Anandi, as shown in the genealogical table filed with the written statement ; and that Ram Saran Ram had a sister's son, named Gokul, who was his nearest heir if the adoption of Ram Saran Ram by his maternal uncle as set up in the defence was not made out.

The first Court overruled all the objections of the defendant No. 1, and gave the plaintiffs a decree, holding that it was not shown that Ram Saran had any sister's son, that the plaintiffs were related to Ram Saran as stated by them, and that, even if the genealogy given by the defendant was correct, still the plaintiffs would, under the Mitakshara, be the heirs of Ram Saran as his *bandhus*.

On appeal by the defendant No. 1 the lower appellate Court, while setting aside the finding of the first Court upon the question of the plaintiffs' relationship with Ram Saran, and accepting the genealogy set up

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by the defendant as correct, has affirmed the first Court's decree on the ground that, according to the defendants' genealogy, the plaintiffs are still the heirs of Ram Saran Lal as his *bandhus*.

Against this decision the defendant No. 1 has preferred this second appeal, and it is contended on his behalf: *first*, that the relationship set up by the plaintiffs being found not established, the lower appellate Court is wrong in giving them a decree upon a case not made in the plaint; and, *secondly*, that the lower appellate Court is wrong in holding that, according to the genealogy set up by the defendant and accepted as true, the plaintiffs were heirs as *bandhus* of Ram Saran.

We do not think there is any force in the first contention. If the defence had been a simple denial of the plaintiffs' alleged relationship and right to inherit, then upon their failure to make out that relationship they would not have been entitled to succeed upon establishing a different relationship, at any rate without **[343]** showing further that there was no nearer heir in existence. But that was not the nature of the defence here. The defendant not only denied the relationship set up in the plaint, but alleged what according to him was the true relationship between the plaintiffs and the late proprietor. He put in a genealogical table setting out this relationship, and he alleged that one Gokul, who was Ram Saran's sister's son, was the nearest heir, and after the first Court had held that Ram Saran had no sister's son, and that even according to the defendants' genealogical table the plaintiffs were the heirs of Ram Saran, the defendant, who was the appellant in the Court of appeal below, did not object to the plaintiffs being allowed to succeed upon the basis of a different relationship from that alleged in the plaint, on the ground of his being taken by surprise, and being prejudiced by such a course being followed, nor did he suggest that there was any nearer heir of Ram Saran. We are, therefore, of opinion that this contention must fail.

The second contention also, we think, is untenable.

The relationship that is found by the lower appellate Court to have subsisted between the plaintiffs and the late proprietor Ram Saran Ram will appear from the following genealogy (see 22 C. 340).

The parties are admittedly governed by the Hindu law as laid down in the Mitakshara, and there is no question that the plaintiffs, if they are the heirs of Ram Saran Ram at all, can be his heirs only as his *bandhus*. The question, therefore, is, whether the plaintiffs are *bandhus* of Ram Saran Ram.

The term '*bandhu*' is defined in the Mitakshara (Chap. II, s. v, verse 3) as a '*bhinna gotra sapinda*,' that is, one sprung from a different family and connected by common corporeal particles, or by consanguinity. Colebrooke incorrectly rendered *sapinda* as one connected by funeral oblation, but this inaccuracy in his translation was pointed out long ago, and the above rendering has now been accepted as the correct one. [See *Lallubhai Bapubhai* v. *Mankuvarbai* (1), the same case on appeal *Lallubhai Bapubhai* v. *Cassibai* (2), and *Umaid Bahadur* v. *Udoi Chand* (3).]

[344] There is also an enumeration of *bandhus* in the Mitakshara (Chap. II, s. vi, verse 1), which is as follows: "*Bandhus* (cognates) are of three kinds—related to the person himself, to his father or to his mother as is declared in the following text: The sons of one's own father's sister, the sons of one's own mother's sister, and the sons of one's own maternal uncle are his own *bandhus*. The sons of one's father's father's

(1) 2 B. 388. (2) 5 B. 110. (3) 6 C. 119.

sister, the sons of one's father's mother's sister, and the sons of one's father's maternal uncle are his father's *bandhus*. The sons of one's mother's father's sister, the sons of one's mother's mother's sister, and the sons of one's mother's maternal uncle are his mother's *bandhus*." (The above translation is slightly different from Colebrooke's, which is some-what inaccurate).

If this enumeration of *bandhus* had been exhaustive it would have been unnecessary to consider the definition of the term quoted above. But it has now been authoritatively settled that the enumeration is not exhaustive : see *Giridhari Lall Roy* v. *Government of Bengal* (1); *Amrita Kumari Debi* v. *Lakhi Narayan Chuckerbutty* (2); and *Umaid Bahadur* v. *Udoi Chand* (3). It becomes necessary therefore to consider the definition of the term '*bandhu*' and to see whether the plaintiffs come within that definition, that is, whether they are '*bhinna gotra sapindas*' of Ram Saran, or of his father, or of his mother. For in any one of these cases they will be entitled to inherit. See Mitakshara, Chap. II, s. vi, verse 1; *Umaid Bahadur* v. *Udoi Chand* (3); *Ananda Bibee* v. *Nownit Lall* (4); now there is no question that the plaintiffs are *bhinna gotras* of Ram Saran, that is, that they are sprung from a *gotra*, or family, different from his. So the question is reduced to this, namely, whether they are the heritable *sapindas* of Ram Saran, either directly or through his father or his mother.

Now the term '*sapinda*' is explained in an earlier part of the Mitakshara in the section relating to marriage when commenting on verses 52 and 53 of Chap. I of Yajnavalkya's Institutes. Translations of portions of that explanation are set out in the **[345]** judgment of this Court in *Umaid Bahadur* v. *Udoi Chand* (3), and a complete translation of the entire passage is given by Babu Rajkumar Sarvadhikari in his Tagore Law Lectures on the Principles of the Hindu Law of Inheritance, pp. 601—605.

According to that explanation or definition a *sapinda* of a man means and includes (1) any descendant within the seventh degree reckoned from and inclusive of himself, that is, any of his first six descendants ; (2) any ascendant within the seventh degree reckoned from and inclusive of himself in the paternal line, that is, any of his first six ascendants, in his paternal line ; (3) any collateral descendant within the seventh degree reckoned from and inclusive of any of the six paternal ascendants, that is, any of the first six descendants of any of the first six ascendants in the paternal line ; (4) any ascendant within the fifth degree reckoned from and inclusive of himself in the maternal line, that is any of the four maternal ancestors, namely, the mother, her father, her grandfather and the rest ; and (5) any collateral descendant within the fifth degree reckoned from and inclusive of any of the three maternal ancestors, beginning with the mother's father, that is, any of the first four descendants of any of the three maternal ancestors, beginning with the mother's father.

The mother's descendants are not here included, as they being ordinarily also the descendants of the father are included among collaterals on the paternal side. As to how the mother will stand with reference to descendants of the mother by a second husband upon her re-marriage after widowhood under the Widow Marriage Act we need not here consider.

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(1) 1 B.L.R. P.C. 44 = 10 W.R.P.C. 31.
(2) 2 B.L.R.F.B. 28 = 10 W.R. F.B. 76.
(3) 6 C. 119.
(4) 9 C. 315 (327).

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Again, a *sapinda* of the *propositus* to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the *propositus*, that the *propositus* is also a *sapinda* of him, either directly or through the father or the mother. This mutuality of *sapinda* relationship between the *propositus* and his heritable *sapinda* is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udoi Chand* (1), and the authority for this is to be found in the text of Manu (Chap. IX, 187), cited in the Mitakshara, Chap. II, s. iii, verse 3, as interpreted **[346]** by Balambhatta and Visweswara Bhutta, the two leading commentators on the Mitakshara. That text according to these commentators means this: "The property of a near *sapinda* shall be that of a near *sapinda*."*

From this it is clear that a man in order to be a heritable *sapinda* of the *propositus* must be so related to him that they are *sapindas* of each other.

Let us now apply this definition of *sapinda* relationship, and this test of mutuality of that relationship, to the present case, and see whether the plaintiffs are heritable *sapindas* of Ram Saran, either directly or through the father or the mother.

We find that the plaintiffs are descended in the third degree from Mangru Ram who was Ram Saran's mother's maternal grandfather, and so they are Ram Saran's *sapindas* through his mother. We also find that Ram Saran was the third in descent from Mangru Ram, who was the plaintiffs' maternal great-grandfather, and so he was their *sapinda* directly. Thus we find that the plaintiffs and Ram Saran are mutually related as *sapindas*, the former through the mother and the latter directly. The plaintiffs are therefore *sapindas* and *bandhus* of Ram Saran, *ex parte materna*, and are his heirs.

The grounds urged before us, therefore, both fail, and this appeal must consequently be dismissed with costs.

J. V. W. *Appeal dismissed.*

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* The passage in the original runs thus:

"यः सापिण्डात् अनन्तरः सन्निाह्नितः तस्य सपिण्ड सन्निहितस्य धनं सपिण्ड सन्निहितस्य धनं भवेत्"

See the commentary of Visweswara Bhutta on the portion of Mitakshara, which appears in Colebrooke's Translation as Chap. II, s. iii. The passage is given in Sarvadhikari's Tagore Law Lectures, p. 569.—*Judge's note.*

(1) 6 C. 119.

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[347] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

RAMANANDA *alias* HARIS CHANDRA CHOWDHRY (*Plaintiff*) v. RAIKISHORI BARMANI FOR SELF AND AS SHEBAIT OF IDOL LUCHMI NARAIN (*Principal Defendant*) AND ANOTHER (*Pro-forma Defendant*).* [16th March, 1894.]

Hindu law—Inheritance—Forfeiture of inheritance—Unchastity—Daughter—Bengal School of Hindu law.

According to the Bengal School of Hindu law, a daughter who is unchaste is precluded from inheriting the property of her father.

[**Overruled**, 40 C. 650 (**F.B.**) = 19 Ind. Cas. 129 (137) ; 17 C. L. J. 438 = 17 C. W. N. 679 ; **F.**, 32 C. 871 = 9 C. W. N. 1003 = 2 C. L. J. 97 ; **R.** 4 N. L. R. 31 (38) ; **D.**, 30 C. 521 (526) = 7 C. W. N. 121 ; 26 M. 509 ; 31 M. 105 = 18 M. L. J. 70 = 2 M. L. T. 533.]

THE suit out of which this appeal arose was brought for a declaration of the plaintiff's right to possession of certain immoveable property by right of his purchase thereof, under a deed of sale, dated 3rd Baisakh 1297 (15th April 1890), from one Ram Sundari Dasia, to whom it belonged, the plaint alleged, by inheritance from her father Gadadhar Das. The plaint stated that on the death of Gadadhar Das the property devolved on his widow Bama Sundari, the step-mother of Ram Sundari Dasia, and on her death in Assar 1292 (July 1885) it descended to Ram Sundari Dasia, but she was kept out of possession of it by Chandramoni Barmani. The plaintiff therefore brought this suit against Chandramoni Barmani as principal defendant, and joined Ram Sundari Dasia as a *pro-forma* defendant. The defendant Chandramoni raised several defences, the only material one of which was that Ram Sundari Dasia became unchaste during the lifetime of her step-mother Bama Sundari Dasia, and according to Hindu law was precluded from inheriting the property. On this issue the Munsif found as follows:—

"The defendant has succeeded in proving that the plaintiff's vendor Ram Sundari Dasia became unchaste long before the succession opened out to her, that is, long before the death of the step-mother Bama Sundari Dasia, and therefore according to Hindu law she is not entitled to succeed to the property in dispute **[348]** as heiress of her father [see *Ram Nath Tolapattro* v. *Durga Sundari Debi* (1)."]

The Munsif accordingly dismissed the suit.

On appeal the Judge upheld this decision on the same ground, finding that Ram Sundari Dasia was unchaste when Bama Sundari died, and under the Hindu law she was precluded from inheriting the property of her father Gadadhar Das.

From this decision the plaintiff appealed to the High Court.

Babu *Girja Sunker Mojumdar*, and Babu *Golap Chunder Sarkar*, for the appellant.

Dr. *Rash Behary Ghose*, Babu *Saroda Charan Mitter*, and Babu *Tara Kishore Chowdhry* (for Babu *Kishore Lall Sarkar*), for the respondent.

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* Appeal from Appellate Decree No. 126 of 1893, against the decree of Babu Shumbhoo Chunder Nag, Additional Subordinate Judge of Pubna, dated the 23rd of November 1892, affirming the decree of Babu Mohim Chunder Sarkar, Munsif of Bogra, dated the 23rd of March 1891.

(1) 4 C. 550.

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The judgment of the Court (NORRIS and BANERJEE JJ.) in which the arguments and cases cited are sufficiently stated, was as follows:—

JUDGMENT.

The question raised in this appeal is, whether, under the Hindu law of the Bengal School, a daughter is precluded from inheriting the property of her father by reason of unchastity.

The Courts below have answered this question in the affirmative, and have accordingly dismissed the suit of the plaintiff who claims under a purchase from the daughter.

It is contended in second appeal that this decision is wrong in law, and that unchastity is no bar to a daughter's inheriting the estate of her father. After giving our best attention to the elaborate argument of Babu Golap Chunder Sarkar, who appeared for the appellant, we must say we do not consider this contention correct.

In the Dayabhaga, which is the leading authority in the Bengal School, the author, in treating of the daughter's succession, observes:—

"But if there be no maiden daughter, the succession devolves on her who has, and on her who is likely to have, male issue. That is declared by Vrihaspati: 'Being of equal class, and married **[349]** to a man of like tribe, and being virtuous and devoted to obedience, she (namely the daughter), whether appointed or not appointed to continue the male line, shall take the property of her father who leaves no son [nor wife]," (Chapter XI, s. II, 8).

The passage in the original (साध्वी शुश्रूषणे रता) which Colebrooke has translated as "virtuous and devoted to obedience" in some editions of the Dayabhaga has a slightly different reading (भर्तुः शुश्रूषणे रता), of which the correct rendering is "devoted to obedience to the husband." But whichever reading is adopted, there is not much difference in meaning, chastity being evidently the qualification intended by both.

Babu Golap Chunder Sarkar has argued that, though this may be the meaning of the text of Vrihaspati, yet when the author of the Dayabhaga, in commenting on that text, says nothing to indicate that in his opinion chastity is a necessary condition for a daughter to inherit from her father, and when on the contrary all that he says about the portion of the text which specifies obedience to her husband is that it indicates that she is not a widow, and may have issue (Chap. XI, s. II, 12), it is not open to us to deduce from this text the condition of chastity; and in support of this argument, the well-known passage in the judgment of the Privy Council, in the case of the *Collector of Madura* v. *Mutu Ramalinga Sathupathy* (1) is relied upon, where their Lordships say: "The duty of an European Judge, who is under the obligation to administer Hindu law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has therefore been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." No doubt in this passage the Judicial Committee of the Privy Council discountenance our deducing from any text of the ancient sages, not referred to by the received commentators of the school which governs the case before us, any doctrine of law not sanctioned directly

(1) 1 B. L. R. P. C. 1=10 W. R. P. C. 21.

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or indirectly by such commentators. But that is not the case here. The [350] text we rely upon is the one that is cited by the author of the Dayabhaga as the basis of the married daughter's right to inherit, and the rule we deduce from it, namely, that chastity is a necessary qualification for entitling her to inherit, is expressly laid down in the text, and though not directly stated, is indirectly indicated with sufficient clearness in the Dayabhaga. For it is said in more than one place in that treatise that the daughter's right of succession to her father's property is founded on her offering funeral oblations by means of her son (Chap. XI, s. II, 11, 15), that is, on her capability of having legitimate male issue, and for the existence of this foundation of her right chastity is an essential condition. It was argued for the appellant that this would be true only in the case of a married daughter succeeding in the lifetime of her husband, and that in the case of a widowed daughter having a son, which was the case before us, chastity would not be a necessary condition. We cannot accept this argument as correct. The question is whether that portion of the text of Vrihaspati cited above which requires that a daughter must be chaste, in order that she may inherit, should be followed as a rule of law, or regarded as a mere moral injunction; and when once it is shown to be operative as a rule of law, we cannot leave it aside as a mere moral injunction.

Moreover, the author of the Dayabhaga has expressly declared that the daughter does not succeed merely in right of her relation as daughter, but she must, in order to be entitled to inherit, satisfy the conditions laid down in Vrihaspati's text, for he says: "Thus by the conditions specified that she be of equal class and married to a man of like tribe, &c., the author shows that she does not inherit her father's wealth merely in right of her relation as daughter" (Chap XI, s. II, 13).

There is another passage in the Dayabhaga bearing upon this question —towards the end of the section treating of the succession of the daughter and the daughter's son. Jimutavahana, the author of the Dayabhaga, after stating that the daughter, like the widow, takes a qualified interest in the estate which at the death of either goes, not to her heirs, but to the next heir of the last full owner, and after giving in support of that view a certain reason, adds another and a better reason in these words:—

[351] "Or the word 'wife' (in the text above quoted, s. I, § 56) is employed with a general import, and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance" (Chap. XI, s. II. 31).

The words within brackets "in the text above quoted, s, I, § 56," are not in the original, and they have been supplied by Colebrooke, as his footnote indicates, from Srikrishna's Commentary. But the word "wife" does not occur in the text, Chap. XI, s. I, § 56 to which reference is here made. In Colebrooke's translation of that text, the word "widow" occurs, but even that word is not to be found in the original, which if literally rendered would run thus:—

"Let the childless preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation until her death. After her death let the heirs take." (* Chap. XI, s. I, 56).

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* In the original the text runs thus:—

अपुत्रा शयनं भर्त्तुः पालयन्ती गुरौ स्थिता ।
भुञ्जीता मरणात् क्षान्ता दायदा ऊर्द्ध्वमाप्नुयुः—*Judge's note.*

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This apparent difficulty is explained by Raghunandana, a high authority in the Bengal School, in his Commentary on this passage of the Dayabhaga, in which he says:—

"The word 'wife' implies females generally. In the text of Katyayana: 'Let the childless preserving unsullied the bed of her lord and abiding with her venerable protector enjoy with moderation until her death. After her let the heirs take'; and in the first half of the next text of the same sage, namely, 'the wife who is chaste takes the wealth of her husband,' the word 'wife' is illustrative."

The passage of Katyayana which Jimutavahana had in view when he said (Chap. XI, s. II, 31) "or the word 'wife' is employed with a general import, &c.," must have been the entire passage given in Raghunandana's Commentary, and not merely the part of it that is quoted in the Dayabhaga (Chap. XI, s. 1, 56); and if that is so, and if the word "wife," in Katyayana's full text is used illustratively for any female heir, chastity must [352] be a condition for a daughter to inherit just as it is a condition for the widow to do so.

The above text of Jimutavahana (Chap. XI, s. II, 31), read with the gloss of Raghunandana, therefore also fully supports the respondent's case.

Against this it has been urged for the appellant in the first place that the authenticity of the Commentary of Raghunandana has been doubted by Colebrooke in his preface to his translation of the Dayabhaga; and in the second place that the passage of the Dayabhaga above referred to (Chap. XI, s. II, 31) has been construed by the Privy Council in the case of *Moniram Kolita* v. *Keri Kolitani* (1) as only extending to other women the rule applicable to a widow as to the quantity and quality of the estate inherited, without laying down anything as to the conditons under which their right to inherit arises.

As to the first objection, notwithstanding that Colebrooke expressed his doubts regarding its authenticity, the late Pundit Bharat Chunder Siromoni, Professor of Hindu Law in the Sanskrit College, Calcutta, has given in full the Commentary bearing the name of Raghunandana as a genuine production of that author, in his elaborate edition of the Dayabhaga, published under the patronage of Babu Prasanno Kumar Tagore, an accomplished Hindu lawyer. The work was published in 1863, and during the last thirty years no scholar or lawyer has ever questioned the genuineness of the commentary, but on the contrary it has been accepted and followed in this Court by Mitter and Maclean, JJ., in the case of *Ram Nath Tolapattro* v. *Durga Sundari Debi* (2). We therefore see no reason to hesitate to accept it as genuine.

Then as to the second objection, the remarks of the Privy Council that are relied upon were made only incidentally, their Lordships not being called upon, except indirectly, and for a collateral purpose, to construe verse 31 of s. II, Chap. XI of the Dayabhaga. The question before their Lordships was whether a widow having inherited her husband's estate is liable to forfeit it for subsequent unchastity, and they incidentally observe: [353] "It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the abovementioned texts of Vrihat Manu or Katyayana."

These are the texts as cited in the Dayabhaga, Chap. XI, s. I, 7 and 56, and they certainly do not lead to the exclusion of the unchaste

(1) 5 C. 776.

(2) 4 C. 550.

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daughter or the unchaste mother from inheritance. But their Lordships had not before them the Commentary of Raghunandana, and the additional text of Katyayana therein cited, and it is this last mentioned text which, read with verse 31, s. II, Chap. XI of the Dayabhaga, leads to the exclusion of the unchaste daughter and the unchaste mother.

The Daya Krama Sangraha of Srikrishna Tarkalankar, another great authority in the Bengal School, also cites the above mentioned text of Vrihaspati as a basis of the married daughter's right of inheritance (Chap. I, s. III, 4).

The three leading authorities of the Bengal School—Jimutavahana, Raghunandana and Srikrishna—are therefore all in favour of the view taken by the Courts below.

There is also an opinion of the Pundits approved by Macnaghten, and given in his Precedents of Hindu law, p. 133, which is to the effect that a daughter who lives in prostitution or is unchaste is incompetent to inherit her father's estate.

Then there is the dictum of Mr. Justice Dwarkanath Mitter in the case of *Keri Kolitany* v. *Moneeram Kolita*(1), confirmed by the dictum of the Privy Council in the same case on appeal *Moniram Kolita* v. *Keri Kolitani*(2), that an unchaste daughter is excluded from inheriting her father's estate.

And lastly there is the decision of Mitter and Maclean, JJ., in the case of *Ram Nath Tolapattro* v. *Durga Sundari Debi* (3), already referred to, that an unchaste mother is excluded from inheritance by verse 31, s. II, Chap. XI of the Dayabhaga, read with the gloss of Raghunandana which makes chastity a necessary condition for all female heirs to inherit.

[354] As to this last-mentioned case, it was very properly admitted for the appellant that, if the reasoning on which it was based was correct, it would conclude the present question; but it was argued that that reasoning had been practically overruled by the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (2). We have, however, shown above that that is not so, and that their Lordships in the case of *Moniram Kolita* v. *Keri Kolitani* had not before them the commentary of Raghunandana with the full text of Katyayana therein cited, upon which Mr. Justice Romesh Chunder Mitter's judgment is really based; and they could not have pronounced any authoritative opinion upon matters that were not before them.

While the foregoing authorities support the view which the respondents contend for, no text or case under the Bengal School of Law was cited, nor are we aware of any, in favour of the opposite view. The cases cited by the learned vakil for the appellant, namely, *Advayapa* v. *Rudrava* (4), *Ganga Jati* v. *Ghasita* (5), and *Kojiyadu* v. *Lakshmi* (6), are in the first place not all in point, and in the second place they are all under Schools of Hindu Law other than the Bengal School, and were decided with reference to authorities different from those that are specially followed in the district with which we have now to deal. They do not, therefore, in our opinion affect the decision of the present case.

The result then is that the appeal fails and must be dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) 13 B.L.R. 1 (45). (2) 5 C. 776 (787). (3) 4 C. 550.
(4) 4 B. 104. (5) 1 A. 46. (6) 5 M. 149.

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Before Mr. Justice Norris and Mr. Justice Banerjee.

HEM CHUNDER SANYAL (*Plaintiff*) *v.* SARNAMOYI DEBI AND ANOTHER (*Defendants*) * [23rd May, 1894.]

Hindu Law—Reversioners—Arrangement between widow and reversioner—Relinquishment by Hindu widow of her life interest to reversioner—Gift by reversioner to widow of moiety of estate—Declaratory decree, Suit for—Suit by reversioner in lifetime of widow—Specific Relief Act (*I of* 1877), s. 42.

[355] *M* died, possessed of certain immoveable properties, and leaving two widows, one of whom died shortly after him, leaving a daughter's son *R*. The other widow *S* came to an arrangement with *R*, under which, on 9th December 1889, two deeds were executed, by the first of which *S* relinquished to *R* her life interest in the properties she inherited as widow of *M*, and by the other *R* conveyed to *S* an absolute right in half the properties so relinquished, retaining the other half himself. *R* died on 27th November 1890, and his widow *P* came into possession of the half share of the properties belonging to him. In a suit by the plaintiff, as the next reversionary heir of *M* for a declaration that the deeds were invalid, and did not affect his reversionary right,—

Held, that the suit was maintainable in the lifetime of the widow. *Isri Dut Koer* v. *Hansbutti Koerain* (1) referred to: *Pirthi Pal Kunwar* v. *Guman Kunwar* (2); *Bhujendro Bhusan Chatterjee* v. *Triguna Nath Mookerjee* (3); and *Kattama Natchiar* v. *Dorasinga Taver* (4), distinguished.

Held, also, following the case of *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* (5), that the moiety of the properties, which was given by *S* to *R*, was absolutely alienated in his favour, and the plaintiff was not entitled to question the validity of the alienation, so far as that portion of the properties was concerned.

Held, further, that though the effect of the decision in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* is to make the widow and the presumptive reversioners competent to deal with the estate absolutely for certain purposes, the widow cannot, with the consent of the presumptive reversioner, convert her life interest in any portion of her husband's estate which she retains for herself into an absolute interest freed from all restraint on alienation. *Behari Lal* v. *Madho Lal Ahir Gayawal* (6), referred to. The plaintiff was, therefore, entitled to a declaration that the deeds were inoperative in affecting his reversionary interest, so far as regarded the moiety in possession of *S*.

[**F.**, 35 C. 939 = 8 C.L.J. 280 = 12 C.W.N. 837; 7 Bom. L.R. 622 (633); 12 Bom. L.R. 621 (629) = 7 Ind Cas. 134 (139); 3 M.L.T. 355 = 18 M.L.J. 309 = 31 M. 366; **R.**, 29 C. 260 (272); 35 M. 712 (721) = 11 Ind. Cas. 769 = 21 M.L.J. 920 = 10 M.L.T. 124; 3 C.L.J. 224; 8 C.L.J. 458 = 13 C.W.N. 201 = 4 Ind. Cas. 513 (516); 40 C. 723 (F B.) = 19 Ind. Cas 273 = 17 C.L J. 499 (543) = 17 C.W.N. 701; 10 C.P. L.R. 1 (5); 14 C.W.N. 226 (228) = 2 Ind. Cas. 660; 9 Ind. Cas. 26 (28); 17 P.R. 1902 = 16 P.L.R. 1902; **Cons.**, 25 B. 129 (140); **D.**, 2 C.W.N. 132 (137); 31 M. 446.]

THE plaintiff brought this suit for a declaration of his reversionary right to certain immoveable properties left by one Madhub Chunder Sanyal, and to set aside as null and void two deeds, one of relinquishment and the other of gift, affecting the said properties.

Madhub Chunder Sanyal died, leaving two widows, Hara **[356]** Sundari Debi and Sarnamoyi Debi. Hara Sundari Debi died leaving a daughter's son named Radhika Nath Bhaduri. Sarnamoyi Debi, the first defendant in this suit, adopted a son to her husband Madhub Chunder, naming him Mohima Chunder Sanyal, and after the death of the other

*Appeal from Original Decree No. 29 of 1893, against the decree of Babu Shumbhoo Chunder Nag, Subordinate Judge of Pubna and Bogra, dated the 30th of January 1893.

(1) 10 C. 324 = 10 I.A. 150.
(2) 17 C. 933 = 17 I.A. 107.
(3) 8 C. 761.
(4) 15 B.L.R. 83 = 23 W.R. 314 = 2 I.A. 169.
(5) 10 C. 1102.
(6) 19 C. 236.

widow Hara Sundari, Radhika Nath brought a suit to set aside this adoption, and obtained a decree in 1292 (1885) declaring the adoption invalid. On 25th Aughran 1296 (December 9th, 1889) the first defendant, Sarnamoyi Debi, and Radhika Nath Bhaduri came to a settlement with respect to the immoveable properties left by Madhub Chunder, in accordance with which Sarnamoyi, by one of the deeds it was sought to set aside, relinquished her life interest in the properties in favour of Radhika Nath, and in consideration of this relinquishment Radhika Nath, by the other deed, conveyed an absolute right in half the properties to Sarnamoyi, retaining the other half himself. Radhika Nath died on 12th Aughran 1297 (November 27th, 1890), leaving a widow Padma Kamini Debi, the second defendant, in possession of his half share of the properties.

The plaintiff, who was the next reversionary heir of Madhub Chunder, prayed for a declaration that his reversionary right was not affected by the two deeds; that the deed of relinquishment created no right in favour of Radhika Nath Bhaduri, and was null and void as against the plaintiff; and that the deed of gift made by Radhika Nath to Sarnamoyi created no absolute right in her, but that she only had a life estate in the properties left by her husband Madhub Chunder.

Issues were raised as to whether the suit was maintainable in the lifetime of Sarnamoyi, and as to the validity or otherwise, and the effect if valid, of the two deeds.

The Subordinate Judge held that the suit being not for a mere declaration, but also for substantial relief, was maintainable, under s. 42 of the Specific Relief Act, during the lifetime of the widow; but that the deeds were *bona fide* and valid, and the plaintiff was not entitled to have them set aside. He therefore dismissed the suit.

The plaintiff appealed to the High Court, and the defendants [357] filed a cross-objection that the lower Court was wrong in holding that the suit was maintainable.

Sir *Griffith Evans*, Babu *Srinath Das*, Babu *Kishory Lal Sarkar*, and Babu *Behary Lal Mitter*, for the appellant.

Dr. *Rash Behary Ghose*, Babu *Golap Chunder Sarkar*, and Babu *Dwarkanath Chakravarti*, for the respondents.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff, appellant, who claims to be the nearest reversionary heir to one Madhub Chunder Sanyal, after the death of Madhub Chunder Sanyal's widow Sarnamoyi Debi, defendant No. 1, for a declaration that a deed of relinquishment of her life-estate executed by Sarnamoyi on the 25th Aughran 1296 in favour of the then next reversioner Radhika Nath Bhaduri, the husband of defendant No. 2, and a deed of gift executed by the said Radhika Nath Bhaduri on the same date, in favour of Sarnamoyi in respect of one-half of the said estate, are inoperative and void as against the plaintiff.

The defence was that the plaintiff, a contingent reversioner, was not entitled to maintain a suit like this in the lifetime of the widow, and that the deeds in question were operative and valid.

The Court below, whilst holding that the plaintiff, as the next reversionary heir, was entitled to maintain a suit like this, has dismissed his suit on the ground that the deeds in question were operative and valid.

Against that decision the plaintiff has preferred this appeal, and contends that the Court below is wrong in holding that the deeds in question

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were valid and binding as against him; and the defendants have preferred a cross-objection under s. 561 of the Code of Civil Procedure to the effect that the Court below is wrong in holding that this suit was maintainable.

The cross objection of the defendants ought to be considered first, because, if it prevails, it will be unnecessary to enter into the questions raised in the appeal of the plaintiff.

It is contended for the defendants, respondents, that as s. 42 of the Specific Relief Act (I of 1877) leaves it in the discretion [358] of the Court to grant a declaratory decree, and as s. 43 of that Act makes the decree in a case like this binding only on the parties to the suit and persons claiming through them, it will not be a proper exercise of discretion for the Court to grant a declaratory decree in this case, when such a decree may not after all be of any use, in the event, by no means an improbable one, of the plaintiff predeceasing the widow, and of some other person being the next heir to her husband at the date of her death; and in support of this contention the cases of *Pirthi Pal Kunwar* v. *Guman Kunwar* (1), *Bhujendro Bhusan Chatterjee* v. *Triguna Nath Mookerjee* (2), and *Kattama Natchiar* v. *Dorasinga Taver* (3), were relied upon.

At first sight it appeared that there was some force in this contention. But after careful consideration we are satisfied that it ought not to prevail. The provisions of the Specific Relief Act do not really support the defendant's contention. Illustration (*e*) of s. 42 shews that a suit, like the present, by a presumptive reversionary heir for a declaration that an alienation by a Hindu widow is void beyond her lifetime is clearly maintainable under that section. The cases cited for the defendants are all distinguishable from the present. In the first case cited, that of *Pirthi Pal Kunwar* v. *Guman Kunwar* (1), the suit was brought by a Hindu widow to obtain a declaration that a certain person, said to have been adopted by her mother-in-law, was not a validly adopted son. The adoption did not, and could not upon the admitted facts of the case, in any way, affect the plaintiff's rights, and all that could be suggested on behalf of the plaintiff in support of a declaratory decree was, as we gather from the judgment of their Lordships of the Privy Council, this, namely, "that at some time or another, after the death of the present plaintiff, the person who, according to the plaintiff's contention, is not an adopted son, may, by some means, either by an act of the Government or otherwise, obtain possession as an adopted son." This their Lordships held was no ground for entitling the [359] plaintiff to ask for a declaratory decree. The plaintiff there had no right which was affected by the adoption; her case could not possibly come under s. 42 of the Specific Relief Act; and so she was held not entitled to sue for a declaration that the adoption was void. The case of *Bhujendro Bhusan Chatterjee* v. *Triguna Nath Mookerjee* (2) was of a very peculiar nature. The suit was brought by a purchaser of a reversionary interest, and the learned Judge who decided it did not lay down any general rule beyond this, that the discretion of the Court in granting a declaratory decree should be exercised with great caution; and having regard to the circumstances of the case before him, which are very different from those of the present case, he held that no declaration ought to be granted. In the last case cited, that of *Kattama Natchiar* v. *Dorasinga Taver* (3), the general principle is no doubt laid down that a declaratory decree cannot be made

(1) 17 C. 933 = 17 I.A. 107. (2) 8 C. 761.
(3) 15 B.L.R. 83 = 23 W.R. 314 = 2 I.A. 169.

unless there be a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court, but that case was decided under the old law, s. 15 of Act VIII of 1859, which was different from the present law on the subject as embodied in s. 42 of Act I of 1877. On the other hand the case of *Isri Dut Koer* v. *Hansbutti Keorain* (1), is a strong authority against the defendants' contention. In that case their Lordships of the Privy Council observe: "The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of Budnath as to which the plaintiffs are clearly right and the defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless, because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner, would be so strong an authority in point as probably to deter either party from disputing it." These observations apply **[360]** with full force to this case; and we must, therefore, disallow the cross-objection of the defendants, and hold that this suit for a declaratory decree is maintainable.

Turning now to the appeal of the plaintiff, let us see what is the nature of the alienations which he asks us to declare invalid as against him. They are two alienations effected by two deeds, bearing the same date, by one of which the widow, defendant No. 1, relinquished in favour of the then next reversioner the whole of her interest in her husband's estate, and by the other the reversioner transferred to her in absolute right one-half of that estate. Looking to the apparent nature of the transaction, the Court below has held that the relinquishment of her interest by the widow in favour of the next reversioner had the effect of vesting the estate absolutely in him; and that, having thus acquired an absolute interest in the whole, he had full authority to transfer one-half of it absolutely to the widow. But though that may be so, if we look merely to the apparent nature of the transaction, yet if we look to its real nature, to its substance rather than to its form, we clearly find, on the face of the deeds themselves, that the relinquishment of her interest in the whole estate of her deceased husband was made by the widow in favour of the next reversioner in consideration of the latter making a gift to her absolutely of one-half of that estate; so that what was really intended to be parted with by the widow in favour of the reversioner, and was actually parted with, was her interest in one-half of the estate inherited by her from her husband, and as a consideration for this the reversioner released in favour of the widow his contingent claims in the other half. And this being the real nature of the transaction, it is contended for the plaintiff, appellant, that neither of the two deeds can be operative beyond the widow's lifetime; that the deed in favour of the reversioner can operate neither as a relinquishment, for there cannot be any relinquishment of anything less than the entire estate, nor as an alienation with the consent of the reversioner, for it is not in favour of a third person; and that the deed executed by the next reversioner, which really is only a release of his claim on half the estate, can have no binding effect on the plaintiff.

The defendants, on the other hand, seek to support the two **[361]** deeds on the broad ground that the widow and the next reversioner are

(1) 10 C. 324.

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jointly competent to deal with the estate in any way they like, and they rest their argument on the decision of a Full Bench of this Court in *Nobokiskore Sarma Roy* v. *Harinath Sarma Roy* (1).

We do not think that the contention of either side is correct to the full extent to which it goes. Touching the Hindu widow's power of alienation otherwise than for legal necessity, two propositions appear to us to be well established.

First, the widow may relinquish the whole of her interest in her husband's estate, and then the next reversioner will acquire the estate absolutely. The reason of this is that it is the intervention of the widow that postpones the succession of the reversioner, and if she walks out of the scene, she thereby anticipates for the reversioner the time of his succession. This view, which is quite in accordance with reason, is also amply supported by the authority of decided cases. See *Shama Soonduree* v. *Shurut Chunder Dutt* (2) ; *Protab Chunder Roy Chowdhry* v. *Joymonee Dabee Chowdhrain* (3) ; and *Behari Lal* v. *Madho Lal* (4).

Second, the widow may convey to the next reversioner, or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest.

The second proposition, though amply supported by the authority of decided cases (see *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, and the cases there cited) is not, it must be owned, reconcilable in its broad generality with the strict principle of Hindu law, as laid down by the original authorities. According to that principle, the reversioner, after a Hindu widow, is the person who is the nearest heir to her deceased husband at the date of her death. And if by death we understand civil death or renunciation of the world or relinquishment of worldly interests as well as natural death, the first of the above two propositions will not conflict with the foregoing principle. But before the event, which is to determine the actual reversioner, namely, the cessation of the widow's estate by death or relinquishment, happens, no **[362]** contingent reversioner can say that the estate will vest in him ; and it is not easy to understand on what principle the widow, by making an alienation (not in the nature of a relinquishment of her estate) either in favour of the next presumptive reversioner or in favour of a third party, with the consent of such presumptive reversioner, can affect the rights of the actual reversioner when the succession opens to him. There is no doubt, authority in the Hindu law for the proposition that the widow may make gifts of suitable portions of her husband's estate to her husband's relations, and with their consent to her paternal relations ; and that in the disposal of property by gift or otherwise she is subject to the control of the members of her husband's family : See Dayabhaga, Chap. XI, s. I, 63, 64. But who those members of the husband's family are whose consent or sanction is necessary to make the widow's alienation valid has not been definitely stated in the text. And the Privy Council, in the case of *Raj Lakhi Debia* v. *Gakul Chundra Chowdhry* (5), while affirming the general proposition that the widow can make a valid alienation of her husband's estate with the consent of her husband's kindred, did not specifically define who they were. The text of the Dayabhaga referred to above evidently formed the basis upon which the earlier decisions, upholding the Hindu widow's alienations with the consent of the reversioner, are based. See the case of *Jadomoney*

(1) 10 C. 1102. (2) 8 W.R. 500. (3) 1 W.R. 95.
(4) 19 C. 236. (5) 3 B.L.R. P.C. 57=12 W.R. P.C. 47=13 M.I.A. 209.

Dabee v. *Saroda Prosono Mookerjee* (1), and the cases therein referred to. In the case of the *Collector of Masulipatam* v. *Cavaly Vencata Narainapah*(2), it was said by the Judicial Committee that "the exception in favour of alienation with the consent of kindred may be due to a presumption of law that, when that consent is given, the purpose for which the alienation is made must be proper." The real ground, however, upon which the decision of the Full Bench in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, in favour of the second proposition stated above is based, is, as the judgments of the learned Judges who composed the Full Bench show, that it would be wrong to upset a long course of decisions, such as there was on the point, and thereby to disturb numerous titles that have been acquired on the strength of those decisions.

[363] Though the effect of the decision in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* is to make the widow and the presumptive reversioner competent to deal with the estate absolutely for certain purposes, we are not prepared to hold that it warrants the proposition that they are competent to deal with it so as to convert the widow's estate, the property still remaining in her, from a qualified into an absolute one.

Following the case of *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, we must hold that the moiety of the estate which was really intended to be given to the then next reversioner Radhika Nath Bhaduri, and which really passed to him, has been absolutely alienated in his favour, and the plaintiff is not entitled to question the validity of the alienation, so far as that portion of the estate is concerned.

But neither the case last cited, nor any other case or text of Hindu law that we are aware of, goes the length of laying it down that the widow can, with the consent of the presumptive reversioner, convert her interest in any portion of her husband's estate which she retains for herself into an absolute interest freed from all restraint on alienation. The two deeds that are sought to be declared invalid after the widow's death must, so far as they relate to the moiety of the estate that the widow has retained for herself, be regarded as a mere contrivance to convert the qualified estate of the widow into an absolute estate to be enjoyed by her free from all restraint on alienation. And we can find no authority for holding that such a conversion or enlargement of her estate is valid. On the contrary it has been held by their Lordships of the Privy Council in *Behari Lal* v. *Madho Lal* (3) that "it was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee," in order that an absolute estate might be created.

In was argued for the appellant that if the moiety of the estate that remains in the widow fails to be converted into an absolute estate, as such conversion by transfer from the reversioner was the consideration for the alienation of the whole estate to him, and as that consideration fails, the whole transfer to the reversioner **[364]** must be declared to have become inoperative. We do not think the plaintiff is entitled to ask for any such declaration. Whether it is competent for the widow to sue to have her conveyance to the reversioner Radhika Nath set aside on the ground of the retransfer to her of the moiety of the estate being inoperative in effecting the purpose for which the two deeds were intended, is a question which we need not here consider. All we now say is that it is the widow

(1) 1 Boulnois 121. (2) 2 W.R.P.C. 59=8 M.I.A. 500. (3) 19 C. 236.

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alone who can raise that question. If she does not choose to raise it, as it was competent to her to make a gift to the reversioner without any consideration, the moiety of the estate that has passed to the presumptive reversioner Radhika Nath cannot be recovered.

The result then is that the decree of the Court below must be set aside, and a declaratory decree given to the plaintiff to the effect that the deeds in question are inoperative in affecting the reversionary interest of the plaintiff, as regards the moiety of the estate of the late Madhub Chunder Sanyal that is in possession of the defendant No. 1, with proportionate costs against her in both Courts. The other defendant is entitled to have her costs in this Court and in the Court below from the plaintiff.

J. V. W. *Appeal allowed.*

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APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

SOSHI BHUSUN GUHA, RECEIVER OF THE FIRM OF PUDDO LOCHUN SHAH (*Defendant No.* 2) AND OTHERS (*Plaintiffs*) *v.* GOGAN CHUNDER SHAHA AND ANOTHER (*Defendant No.* 1)*. [18th December, 1894.]

Bengal Tenancy Act (*VIII of* 1885), *ss.* 65, 148, *cl.* (*h*), 176 161, 167—*Estoppel—Mortgagor and Mortgagee—Order in execution proceedings against mortgagee—Decree obtained before Bengal Tenancy Act came into force—Execution under former Rent Law—Incumbrance—Mode of annulling incumbrance—Sale for arrears of rent—Charge of rent as a first charge on tenure—Sale in execution of mortgage decree—Decree for sale.*

By a mortgage bond, dated 22nd August 1884 and registered, *K* created a charge in favour of the plaintiff on six *taluks* for repayment of the mortgage [365] debt, in respect of two of which *taluks* suits had been brought by the zemindar for arrears of rent, and decrees obtained on 6th June 1885, before the coming into operation of the Bengal Tenancy Act (VIII of 1885). After that Act had come into force, these decrees were assigned to G, a *benamidar* for *P*, for execution, and on his seeking to execute them, he was opposed by *K* on the ground that, as the transfer of the decree by assignment, and the subsequent application for execution were made after the Bengal Tenancy Act had come into force, and as *G*, the assignee, had acquired no interest in the *taluks*, his application for execution could not be granted under s. 148, cl. (*h*) of that Act. On the 9th July 1886 the Court overruled this objection, and ordered execution to issue, holding that as the decrees in the rent suits were passed before the Tenancy Act came into operation, the execution should proceed under the old law. In execution of the decrees of the two *taluks* were put up for sale, and purchased by *G* as *benamidar* for *P*. In a suit brought by the plaintiff, the mortgagee, against *K* and *P* (and others representing others of the six *taluks*), it was contended, so far as the two *taluks* were concerned, that the plaintiff, though not a party to the execution proceedings, was bound by the order of the 9th July 1886, made in the course of those proceedings; that *P* having purchased the two *taluks* at sales for arrears of rent had acquired them free from all incumbrances; that the plaintiff's mortgage was not a notified incumbrance within the meaning of s. 161 of the Tenancy Act; and that he was therefore, not entitled to have his mortgage lien declared against the two *taluks*. *Held* (affirming the judgment of the lower appellate Court) that the plaintiff was not bound by the order of 9th July 1886, *K*, the mortgagor, not representing his interest sufficiently to

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* Appeal from Appellate Decree No. 1845 of 1893, against the decree of Babu Girindro Mohun Chuckerbutty, Officiating Subordinate Judge of Tipperah, dated the 8th July 1893, modifying the decree of Babu Bhuggobutty Churn Mitter Munsif of Kusba, dated the 27th of June 1892.

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make that order binding on the plaintiff as mortgagee. *Dooma Sahoo* v. *Joonarain Lall* (1), *Tribhobun Singh* v. *Jhono Lal* (2), *Bonomali Nag* v. *Koylash Chunder Dey* (3), *Madho Pershad Singh* v. *Purshan Ram* (4), and *Sitaram* v. *Amir Begam* (5), referred to.

The proprietor of an estate cannot be said to represent the whole estate after he has mortgaged it; and this distinguishes the case of a mortgagor as representing an estate from that of a Hindu widow, or *shebait*, who are held to represent the estate so as to bind the reversioner or the succeeding *shebait*. The interest of a mortgagee in an estate may be greater than that left in the mortgagor, or, as in the present case, where it was no part of the mortgagor's interest to protect the incumbrance, the interests of the mortgagor and mortgagee are not identical; the balance of justice and expediency, therefore, is in favour of not allowing a mortgagee to be bound by an order made against his mortgagor.

Nor is there anything in the provisions of the rent law against that view. A decree for rent of a tenure obtained against the registered tenant binds [366] an unregistered transferee of the tenure, who can show no sufficient cause for not registering his name, and may be enforced by sale of the tenure; [*Sham Chand Kundu* v. *Brojonath Pal Chowdhry* (6)]; but whether any such sale was in sufficient conformity with the rent law to be operative in annulling a prior mortgage, or other incumbrance, must be determined in the presence of the party claiming the benefit of the incumbrance. *Tirbhobun Singh* v. *Jhono Lal* (2), and *Madho Pershad* v. *Purshan Ram* (4), referred to.

Held, also that, though the rent decrees were passed under the old rent law, the assignment and the application by the assignee for execution having been made after the Bengal Tenancy Act came into force, cl. (*h*) of s. 148 of that Act applied to the execution proceedings [*Ranjit Singh* v. *Meherban Koer* (7)], and the sale on such an application, which is prohibited by that clause, must be held to be no sale under the rent law.

That clause does not affect any vested right. All that it prohibits is an application for the enforcement of the decree by an assignee, and that is a matter of procedure. If any right is affected, it is not a right of the decree-holder, but the right of the assignee of the decree to apply for execution, and in this case there was no such assignee before the Bengal Tenancy Act came into force.

The mode provided by s. 167 of the Bengal Tenancy Act is the only mode in which incumbrances can be annulled by purchasers of tenures for arrears of rent, and that mode not having been followed in this case, the incumbrance on the two *taluks* was not annulled.

Section 65 of the Tenancy Act, which provides that "the tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon," only intends what is laid down in Chap. XIV of the Act, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances; and if in any case the decree for rent either has not been, or cannot be, enforced by sale of the tenure, the charge created by s. 65 cannot be enforced in any other way. No reason, therefore, could be shown under that section for making the sale in satisfaction of the plaintiff's mortgage subject to the rent decree as a first charge.

[R., 33 M. 459 (462) = 5 Ind. Cas. 732 = 20 M.L.J. 752 = (1910) M.W.N. 26; 6 Bom. L. R. 305 (306); 1 C.L.J. 500; 14 C. L. J. 136 (143) = 11 Ind. Cas. 453 (457); 13 C.W.N. 281 = 8 C.L.J. 478 = 4 Ind. Cas. 92; 10 C.P.L R. 48; 4 Ind. Cas. 1091 = 5 M.L.T. 37; **D.**, 11 C.P.L.R. 95 (99); 20 C.L.J. 1 (8).]

THE plaintiff in this case sued to recover Rs. 1,000 as principal and interest due on a registered mortgage-bond, dated 7th Bhadro 1291 (22nd August 1884), executed by Kartick Nath, the defendant No. 1, in favour of the plaintiff, and creating a charge on six *taluks* belonging to that defendant. The plaintiff alleged that of the six *taluks*, Nos. 1, 2 and 3 were found to have been transferred to Telu Nath Chowdhry, defendant No. 2, as *benamidar*, by fictitious [367] deeds, and he was therefore added as a *pro forma* defendant The other defendants Kamalamoni Dasi, widow of one Ramadas Shaha, Padma Lochun Shaha, Ram Chunder Shaha,

(1) 12 W.R. 362 = 4 B.L.R.A.C. 27 (note). (2) 18 W.R. 206. (3) 4 C. 692.
(4) 4 C. 520. (5) 8 A. 324. (6) 12 B.L.R. 484 = 21 W.R. 94.
(7) 3 C. 663.

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Nundow Lal Shaha and Radha Mohan Shaha, the transferees of *taluks* 4 and 5, were added as parties after an objection had been taken by defendant No. 2 to the suit for non-joinder of parties. The plaint prayed that the mortgage lien of the plaintiff over the mortgaged properties might be declared; for a decree against defendant No. 1 for the sum sued for; that in default of payment the mortgaged properties be sold, and, if the sale proceeds were insufficient, for an order to proceed against the defendant No. 1 and his other properties.

The defendant No. 1 did not appear. The defendant No. 2 denied that he was a *benamidar* for the defendant No. 1. He stated that the zemindar of *taluks* 1, 2 and 3 brought three suits for arrears of rent of those *taluks*, and obtained decrees on the 12th, 13th and 14th of May 1886, in execution of which decrees respectively the *taluks* 1, 2 and 3 were sold and purchased by him (the defendant No. 2) on the 16th July 1886; that the sales were confirmed on 7th September 1886, and that he had since been in possession of those three *taluks*. He alleged that the plaintiff's mortgage was not a notified incumbrance within the meaning of the Bengal Tenancy Act; that the plaintiff not having saved those *taluks* from sale for arrears of rent was estopped by his conduct from obtaining any relief against them in this suit; and that the *taluks* 1, 2 and 3 having been sold for arrears of rent, the plaintiff's mortgage lien, if it existed, had been avoided, and the *taluks* purchased by him free of all incumbrances.

The other defendants made substantially the same allegations, with respect to *taluks* 4 and 5, as the defendant No. 2 made with respect to *taluks* 1, 2 and 3. Suits were brought for the arrears of the rents of *taluks* 4 and 5, in which decrees were obtained on 6th of June 1885, execution was applied for, and the execution cases struck off on 9th November 1885, after which these decrees were assigned by the defendants (after the passing of the Bengal Tenancy Act) to one Ganga Charan Shaha, for execution *benami* for them. Ganga Charan applied for execution of those two decrees in May 1886; the **[368]** judgment-debtors Kartick Nath and others objected that under s. 148 of the Bengal Tenancy Act execution could not proceed, inasmuch as Ganga Charan was merely the assignee of decrees for arrears of rent. This objection was overruled on 9th July 1886, and execution allowed to proceed. Execution of those decrees then proceeded as under the old rent law, and the *taluks* 4 and 5 were sold on 8th November 1886. These sales were subsequently set aside, and the two *taluks* were again sold on 7th March 1887, and purchased by Ganga Charan Shaha, who on 27th May 1887, obtained sale certificates, granted under Bengal Act VIII of 1865, of his purchase of those two *taluks*. These defendants therefore (Ganga Charan Shaha being merely their *benamidar*) claimed to be purchasers of *taluks* 4 and 5, free of all incumbrances. As to *taluk* No. 6 it was admittedly in the possession of the defendant No. 1.

The Munsif made a decree, declaring the mortgage lien of the plaintiff over *taluks* 1, 2, 3 and 6, but held that the plaintiff was not entitled under the circumstances of the case to proceed against *taluks* 4 and 5. This was a decree against defendants No. 1 and 2 only. From this decree defendant No. 2 and the plaintiff both appealed to the Subordinate Judge, who allowed the plaintiff's appeal as to *taluks* 4 and 5, and dismissed the appeal of the defendant No. 2 as to *taluks* Nos. 1, 2 and 3, the result being a decree for the plaintiff for the recovery of the amount claimed, by the enforcement of the lien, with regard to all the mortgaged properties, by sale.

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From this decision the defendants Padma Lochun and others, the purchasers of *taluks* 4 and 5, appealed to the High Court, being represented by one Soshi Bhusun Guha, who had been appointed receiver of the firm to which they belonged. The grounds of appeal are stated in the judgment of the High Court.

Babu *Lal Mohan Das*, for the appellant.

Babu *Tarakissore Chowdhry*, for the respondent.

The judgment of the Court (NORRIS and BANEJEE, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff, respondent, to recover money due on a mortgage-bond, executed by [369] defendant No. 1, by the sale of the mortgaged properties, which are six *taluks* ; and if they are not sufficient to pay off the mortgage debt, then by the sale of other property of the mortgagor. Of the other persons joined as defendants, defendant No. 2 is the purchaser of the three of the *taluks*, namely, Nos. 1, 2 and 3, and the remaining defendants now represented by the appellant were the purchasers of two of the *taluks*, namely, Nos. 4 and 5, at sales in execution of decrees for the rents of the same. These defendants contested the suit on the ground that, as auction-purchasers of the *taluks* in execution of decrees for arrears of rent, they had purchased the same free of all incumbrances, and that the mortgage was no longer enforceable against the *taluks*.

The first Court decreed the claim against defendant No. 1, but made a decree for sale of *taluks* Nos. 1, 2, 3 and 6 only. Against that decree both plaintiff and defendants preferred appeals, and the appeal of the plaintiff was allowed, and *taluks* Nos. 4 and 5 were ordered to be sold in satisfaction of the mortgage debt, while the appeal of the defendants was dismissed.

Against the decisions of the lower appellate Court, the defendant, who now represents the auction-purchasers of *taluks* Nos. 4 and 5, has preferred the present appeal, and it is contended on his behalf :

First, that the lower appellate Court is wrong in holding that the plaintiff, who is a mortgagee from defendant No. 1, is not estopped by the orders made in the course of the proceedings in execution of the rent decrees in the presence of the *talukdar*, the mortgagor.

Secondly, that even if the plaintiff was not estopped by those orders, the Court of appeal below is in error in holding that they were wrong, and that s. 148, cl. (*h*) of the Bengal Tenancy Act, was applicable to this case.

Thirdly, that the Court of appeal below was wrong in holding that the auction-purchasers were not entitled to annul the incumbrance created by the mortgage, owing to their not having proceeded to do so under s. 167 of the Bengal Tenancy Act.

And, fourthly, that the lower appellate Court was wrong in ordering the sale of the mortgaged properties without the qualification [370] that the sale should be subject to the claim under the rent decrees, when rent was a first charge on them under s. 65 of the Bengal Tenancy Act.

The facts upon which the first contention of the appellant is based are shortly these : The defendant No. 1 mortgaged the *taluks* in favour of the plaintiff on the 7th Bhadro 1291, corresponding to some time in August 1884. Subsequent to the mortgage, the proprietor, under whom the two *taluks* Nos. 4 and 5 are held, brought two suit for arrears of rent due in respect thereof against the defendant No. 1, and obtained decrees

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on the 6th June 1885. Those two decrees were executed in 1885, and on the 9th November 1885 the execution cases were struck off. Thereafter (and subsequent to the date when the Bengal Tenancy Act came into operation) one Ganga Charan Shaha, who is shown to be the *benamidar* for the parties now represented by the appellant, took an assignment of the decrees, and sought to execute the same. He was opposed by the judgment-debtor, the *talukdar*, on the ground that as the transfer of the decree by assignment, and the subsequent application for execution, were made after the Bengal Tenancy Act had come into operation, and as the assignee of the decrees had acquired no interest in the estate, his application for execution could not be granted under s. 148, cl. (*h*) of the Bengal Tenancy Act. The Court by its order, dated 9th July 1886, overruled this objection, and ordered execution to issue, holding that, as the rent-decrees were passed before the Bengal Tenancy Act came into operation, the execution should proceed under the old law. The execution proceeded, and the assignee of the decrees was the purchaser at the execution sales.

The lower appellate Court has held that the order of the 9th of July 1886, which was made in the course of proceedings to which the plaintiff was no party, does not bind him; that the said order was wrong; and that the execution sales cannot be regarded as sales at which the purchaser became entitled to the undertenures free of all incumbrances.

The learned vakil for the appellant contends that whether the order of the 9th July 1886 be correct or not the plaintiff is bound by it.

[371] No authority is cited in support of this contention; but it is argued that the interest of the mortgagee should be held to be sufficiently represented by the mortgagor, so that a judgment or order which binds the latter ought to be binding on the former; that the balance of justice and expediency is in favour of this view; and that in the particular case before us, the order in question, being one made in the course of proceedings in execution of a rent decree against the recorded tenant, should, according to the principles of the rent law, be held to be binding against all persons having any interest in the tenure.

In dealing with this argument we should observe at the outset that the matter is not *res integra*, and that there is a strong current of decisions against the appellant's contention, and in favour of the view taken by the lower appellate Court.

In *Dooma Sahoo* v. *Joonarain Lall* (1), Glover and Dwarkanath Mitter, JJ., and in *Tirbhobun Singh* v. *Jhono Lal* (2), Couch, C.J. and Ainslie, J., expressly held that a mortgagee was not bound by a decree passed against the mortgagor after the date of the mortgage. These two cases have been followed in *Bonomali Nag* v. *Koylash Chunder Dey* (3); and *Madho Pershad Singh* v. *Purshan Ram* (4); and these last have been followed by the Allahabad High Court in *Sitaram* v. *Amir Begam* (5). In two of these cases, again, namely, the second and the fourth, the decrees which were held not to be binding on the mortgagee were decrees made in rent suits against the mortgagor; and these cases therefore meet the argument based upon the special provision of the rent law.

Nor are the reasons urged on behalf of the appellant sufficient to induce us to dissent from the view taken in the cases cited above. The general rule is that a judgment *inter partes* binds only the parties, and

(1) 12 W.R. 362=4 B.L.R.A.C. 27 (note). (2) 18 W.R. 206. (3) 4 C. 692.
(4) 4 C. 520. (5) 8 A. 324.

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persons deriving title from them subsequent to the date of the judgment. [See *Doe* v. *Earl of Derby* (1), and Bigelow on Estoppel, 4th edition, p. 135.] There are no doubt many exceptions to this rule, but they are based either upon **[372]** grounds of justice and expediency as in the cases in which judgments against a Hindu widow or a *shebait* have been held to be binding on the reversioner, or the succeeding *shebait*, or upon express legislation, as in the cases in which decrees for rent against registered tenants have been held to be binding on unregistered transferees of tenures; but the present case does not come under any of these descriptions. A Hindu widow or a *shebait* must be held to represent the estate completely, as otherwise there could be no one to represent such estate. But the same thing cannot be said of the proprietor of an estate after he has mortgaged it. The mortgagee can always be ascertained; very often his interest in the estate may be much greater than that left in the mortgagor; and sometimes, as in the present case, where after decree it was no part of the mortgagor's interest to protect the incumbrance, the interest of the two are not identical. While on the one hand to one who is anxious to acquire a safe title by *res judicata* the inconvenience in including the mortgagee as a party defendant is not very great, on the other hand, the injustice of binding the mortgagee by a decree, to which he was no party, must be very considerable. The balance of justice and expediency is in our opinion decidedly in favour of the view taken by the Court below.

Nor do the provisions of the rent law furnish any clear reasons against that view. All that they lead to is that a decree for rent of a tenure obtained against the registered tenant binds an unregistered transferee of the same who can show no sufficient cause for not registering his name, and may be enforced by sale of the tenure: see *Sham Chand Kundu* v. *Brojonath Pal Chowdhry* (2). But whether any such sale was in sufficient conformity with the rent law to be operative in annulling a prior mortgage, or other incumbrance, must have to be determined in the presence of the party claiming the benefit of the incumbrance. There is nothing in the rent law, nor is there any decided case, to support the opposite view. On the contrary two of the cases cited above, *Tirbhobun Singh* v. *Jhono Lal* (3) and *Madho Pershad* v. *Purshan Ram* (4), directly support the view we take.

[373] We should add that the assignee of the decree being himself the purchaser in execution in this case, none of those considerations here arise upon which the rights of third parties purchasing in execution of decrees have, under certain circumstances, been held to be unaffected by infirmities in the decree or the order for sale.

Upon reason and authority, therefore, the view taken by the Court below is correct, and the first contention of the appellant must fail.

Nor is there much force in the second contention of the appellant. Though the decree was passed under the former Rent Act, the assignment of the decree and the application for execution by the assignee having been made after the Bengal Tenancy Act came into operation, cl. (*h*) of s. 148 of that Act must apply to the execution proceedings [see *Ranjit Singh* v. *Meherban Koer* (5)], and the sale upon such an application, which is prohibited by that clause, must be held to be no sale under the rent law.

(1) 1 A. & E. 783. (2) 12 B.L.R. 484 = 21 W.R. 94. (3) 18 W.R. 206.
(4) 4 C. 520. (5) 3 C. 663.

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It is contended by the learned vakil for the appellant that though that would have been so if the clause in question related to a mere matter of procedure, yet as the rule laid down in that clause affects, not merely a matter of procedure, but also a substantial right of the decree-holder, namely, his right to transfer the decree, the clause ought not to apply to a case like this where the decree had been obtained before it came into operation. If cl. (*h*) of s. 148 had affected any vested right, the argument would have been sound. [See *In re Joseph Suche & Co.* (1) and *Gardner* v. *Lucas* (2)]. But does the clause affect any vested right? We think clearly not. It does not prohibit the decree-holder to assign his decree, nor does it prohibit any one from accepting an assignment of the decree, so long as satisfaction can be obtained out of Court. All that it prohibits is an application for enforcement of the decree by an assignee. This is a matter of procedure; at any rate the right affected, if any, is not any right of the decree-holder, but that of the assignee of the decree to apply for execution; and there was no such assignee here before the **[374]** Bengal Tenancy Act came into operation. The clause in question cannot, therefore, in any sense be said to affect any vested right in this case. The second contention of the appellant must therefore also fail.

In support of his third contention the learned vakil for the appellant argued that, though s. 167 of the Bengal Tenancy Act, prescribes one mode of annulling incumbrances, an incumbrance is not protected merely because that mode has not been followed. But, as was pointed out during the argument, this contention is fully met by ss. 165 and 166 of the Act which provide that the mode prescribed by s. 167 is the only mode in which incumbrances can be annulled by purchasers of tenures and holdings for arrears of rent.

Lastly, it was contended for the appellant that, though the sales in question may not have the effect of annulling the mortgage in favour of the plaintiff, still as rent is declared by s. 65 of the Bengal Tenancy Act to be a first charge on the tenure, and as the appellant is the assignee of the rent decree, the sale that is ordered in satisfaction of the plaintiff's mortgage ought to be subject to such first charge. The answer to this contention is that s. 65, which provides that the "tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon," only intends what is explicitly laid down in subsequent sections of the Act, that is, those in Chap. XIV, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances, and if in any case the decree for rent either has not been, or cannot be, enforced by the sale of the tenure, we do not think that the charge created by s. 65 can be enforced in any other way.

The grounds urged before us, therefore, all fail, and the appeal must consequently be dismissed with costs.

J. V. W. *Appeal dismissed.*

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(1) L. R. 1 Ch. D. 50.

(2) L.R. 3 App. Cas. 552 (603).

22 C. 375.

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APPELLATE CIVIL.

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[375] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

CHUNDRA NATH GOSSAMI (*Decree-holder*) *v.* GURROO PROSUNNO GHOSE (*Judgment-debtor*).* [23rd January, 1895.]

Limitation Act (*XV of* 1877), *sch. II, art.* 179, *cl.* 4—*Application for transfer of decree —Civil Procedure Code* (*Act XIV of* 1882), *s.* 223—*Step-in-aid of execution of a decree.*

An application, to the Court which passed a decree, for its transfer to another Court for execution under s. 223 of the Civil Procedure Code, is a step in aid of execution, and sufficient to keep the decree alive within the meaning of the Limitation act, sch. II, Art. 179. cl. 4,

Nilmony Singh Deo v. *Biressur Banerjee* (1), explained. *Collins* v. *Maula Baksh* (2), and *Latchman Pundeh* v. *Maddan Mohun Shye* (3), referred to and followed.

[F., 11 A.L.J. 533=19 Ind. Cas. 664=35 A. 389; 55 P.R. 1904; **Appr.**, 2 C.W.N. 415; **D.**, 23 B. 311 (315).]

ONE Chundra Nath Gossami obtained a decree against Gurro Prosunno Ghose and others on the 7th August 1889 in the Munsif's Court of Golaghat. On the 6th August 1892 the decree-holder applied to the said Munsif for transfer of the decree for execution to the Munsif's Court of Sibsagar on the ground that the judgment-debtors were residing within the jurisdiction of that Court. The decree having been transferred, the decree-holder made a formal application for its execution. The judgment-debtors objected to the execution of the decree on the ground of limitation; and the Munsif of Sibsagar, relying upon the case of *Nilmony Singh Deo* v. *Biressur Banerjee* (1), held that the application was not a step in aid of execution within the meaning of art. 179 of the Limitation Act, and consequently it was barred.

On appeal, the Subordinate Judge of Sibsagar confirmed the judgment of the Munsif, holding that the present case was covered by the case referred to by the Munsif.

From this decision the decree-holder preferred an appeal to the High Court.

[376] Babu *Surendra Nath Roy*, for the appellant, argued that the case of *Nilmony Singh Deo* v. *Biressur Banerjee* (1) had no application to the present one. That case was clearly distinguishable. There it was held that an application for transfer was not an application for execution within the terms of s. 230 of the Code of Civil Procedure. In the present case the application was under s. 223 of the Civil Procedure Code. In the course of his argument he cited the following cases: *Collins* v. *Maula Baksh* (2) and *Latchman Pundeh* v. *Maddan Mohun Shye* (3).

Moulvi *Shamsul Huda*, for the respondent.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

In this case both Courts have held that the execution is barred by limitation under art. 179 of the Limitation Act, and they have cited as

* Appeal from order No. 344 of 1893, against the order of F. Monahan, Esq., Subordinate Judge of Sibsagar, dated the 4th of August 1893, affirming the order of Moulvie Nojmal Hossen Ahmed, Extra Assistant Commissioner and Munsif of Sibsagar, dated the 15th of April 1893.

(1) 16 C. 744. (2) 2 A. 284. (3) 6 C. 513.

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an authority for the conclusion arrived at a case of *Nilmony Singh Deo* v. *Biressur Banerjee* (1). It seems that the decree was passed on the 7th of August 1889 in the Golaghat Court, and on the 6th of August 1892 the decree-holder applied for a transfer of the decree to the Sibsagar Court on the ground the judgment-debtor was residing there, and that the decree would have to be executed in that Court. This application was complied with, and on a formal application for execution being afterwards made in the Sibsagar Court, that Court held that the execution was barred under the article referred to. The question, therefore, is whether the application to transfer the decree to another Court under the circumstances stated in s. 223 is or is not a step in aid of execution within the meaning of art. 179. The case cited by the lower Courts and referred to above seems to us to have no application to the present case. It merely decided that an application for the transfer of a case was not an application for execution within the meaning of s. 230. On the other hand it was held in the cases of *Latchman Pundeh* v. *Maddan Mohun Shye* (2), and *Collins* v. *Maula Baksh* (3), that an application, such as that with which we are now dealing, was a step in aid of execution, and would be [377] sufficient to keep the decree alive, and it seems difficult to understand how any different effect could be given to such application, because if a decree cannot be executed by the Court which passed it, owing to the judgment-debtor not being personally subject to the jurisdiction of that Court, or because of his having no property within it, the only course which the decree-holder could take to obtain satisfaction of his decree would be to have the decree transferred to a Court in which execution would be had, and that must, we think, be taken to be a step, and a very necessary step, in aid of execution.

We must, therefore, set aside the orders of both the lower Courts, and hold that the execution is not barred.

The appeal is decreed with costs.

S. C. G. *Appeal allowed.*

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22 C. 377.

APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Sale.

KRISHNA DHAN MANDAL AND OTHERS *v.* QUEEN-EMPRESS.*
[13th November, 1894.]

Acquittal—Previous acquittal, when no bar to further trial—Single act constituting several offences—Power of Appeal Court in disposing of appeal—Retrial, Effect of order directing, in case where one act constitutes several offences, and there has been an acquittal on some charges and a conviction on others and an appeal from such conviction—" Verdict "—Criminal Procedure Code (1882), *ss.* 236, 403 *and* 423.

The word "verdict," as used in cl. (*d*) of s. 423 of the Code Criminal Procedure, in cases where an accused person is tried for various offences arising out of a single act or series of acts, as contemplated by s. 236, means the entire verdict on all the charges, and is not limited to the verdict on a particular charge upon which an accused may have been convicted and appealed against.

Where an accused person is charged with and tried for various offences arising out of single act, or series of acts, it being doubtful which of those offences the act or acts constitute, and where he has been acquitted by the verdict of a jury of some of such offences and convicted of others and appeals against such conviction, and where the appellate Court reverses the verdict of [378] the jury, and

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*Criminal Appeal No. 655 of 1894, against the order passed by J. Knox Wight, Esq., Additional Sessions Judge of 24-Pergunnahs, dated the 5th of July 1894.

(1) 16 C. 744. (2) 6 C. 513. (3) 2 A. 284.

orders a retrial without any express limitation as to the charges upon which such retrial is to be held, such retrial must be taken to be upon all the charges as originally framed, and the acquittal by the jury on the previous trial upon some of such charges is no bar to the accused being tried on them again, as, having regard to the provisions of s. 423 of the Code of Criminal Procedure, the provisions of s. 403 in that respect cannot apply to such cases.

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[R., 23 C. 975 (979); 40 C. 163 (169) = 13 Cr.L.J. 497 = 15 Ind. Cas. 641; 3 Bur. L.T. 124 = 11 Cr. L.J. 738 = 8 Ind. Cas. 952 = 5 L.B.R. 241 (243); 12 P.R. 1904 (Cr.) = 110 P.L.R. 1904; 37 M 119 = 15 Cr. L.J. 180 = 22 Ind. Cas. 756.]

THE facts of this case was shortly as follows :—

The accused, six in number, were charged with having been jointly concerned in a riot, in the course of which a man named Mahabir was killed in execution of the alleged common object of the unlawful assembly, which was to dispossess the deceased man's tenants from certain land, and to carry away the paddy thereon by force.

All the accused had been previously tried by the Sessions Court of the 24-Pergunnahs for offences under ss. 302 (murder) and 325 (grievous hurt), read with s. 149, in respect of the same occurrence. They were acquitted of murder, but convicted of grievous hurt.

They then appealed to the High Court, and the result of the appeal was that the conviction was set aside on the ground of misdirection of the jury by the Judge, and the accused were ordered to be retried.

On the new trial they were charged with offences under ss. 148 and 304, read with s. 149, and the jury convicted them of culpable homicide, not amounting to murder, under s. 304, read with s. 149, and the Sessions Judge, agreeing with that verdict, sentenced them each to transportation for ten years.

They again appealed to the High Court, on the ground that having once been tried for and acquitted of murder and culpable homicide not amounting to murder in the first trial, they could not be tried again under the same charges for the same offences. They further contended that the conviction was again vitiated by misdirection of the jury, but it is not necessary for the purpose of this report to further notice that point.

On the appeal coming on to be heard—

Mr. *Allen*, and Babu *Bykant Nath Dass*, appeared for the appellants.

[379] Babu *Ram Churn Mitter* and Babu *Atulya Churn Bose*, for the Crown.

The arguments of counsel on the first contention appear sufficiently from the judgment of the High Court (BANERJEE and SALE, JJ.) which was as follows :—

JUDGMENT.

The appellants in this case were tried by a jury before the Sessions Court of the 24-Pergunnahs on charges under ss. 148 and 304, read with s. 149, of the Indian Penal Code, and they have been convicted under ss. 304 and 149 of culpable homicide not amounting to murder, by causing the death of one Mahabir Singh, and sentenced to ten years' transportation each. In appeal it is contended on their behalf that the conviction is wrong, first, because there is a previous acquittal which is a bar to the present trial; and, secondly, because the verdict of the jury is erroneous, owing to material misdirection by the Judge to the jury, the misdirection consisting in (*a*) the Sessions Judge not pointing out properly the distinction between murder and culpable homicide, and (*b*) the Sessions Judge further not pointing out properly the circumstances under which s. 149 of the Penal Code applies.

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The facts upon which the first contention is based are as follows: The accused were tried on a former occasion before the Sessions Court of the 24-Pergunnahs for offences punishable under ss. 302 and 325 of the Indian Penal Code, each read with s. 149, that is, for the offences of murder and grievous hurt alleged to have been committed by some members of an unlawful assembly, of which the accused were also members, in prosecution of the common object of the assembly. They were acquitted of the former offence, that is, murder, and were convicted of causing grievous hurt to Mahabir Singh. They appealed to this Court, and the result of the appeal was that the conviction was set aside, the verdict of the jury being found to be erroneous, owing to misdirection by the Judge, and they were ordered to be re-tried. In the re-trial held under the order of this Court, the accused have been convicted under s. 304, read with s. 149 of the Penal Code, and it is against this conviction under ss. 304 and 149 of the Indian Penal Code that the present appeal is preferred.

[380] These being the facts of the case, it is contended by the learned counsel for the appellants in support of his first ground, (1) that, as a matter of law, this Court could not have interfered with the acquittal of the accused on the charge of murder, there having been no appeal by the Local Government, as provided by s. 417 of the Code of Criminal Procedure; (2) that, as a matter of fact, this Court did not interfere with the acquittal on the charge of murder, it having set aside only the conviction of the accused; and (3) that the previous acquittal of the accused on the charge of murder is by s. 403 of the Code of Criminal Procedure a bar to the trial and conviction for culpable homicide not amounting to murder.

With reference to the first point raised in this contention, it is clear from ss. 404 to 417 of the Code of Criminal Procedure, that where a person is tried on one charge only and is acquitted on it, or is tried on several charges and is acquitted on them all, the acquittal cannot in any way be interfered with, except upon appeal by the Local Government. But the matter is not equally clear, when an accused person is tried on several charges, is acquitted on some and convicted on the others, and appeals from the conviction. Clause (*b*) of s. 423 of the Criminal Procedure Code which provides that in an appeal from a conviction the appellate Court may set aside the conviction and sentence and order a re-trial, or it may alter the finding, maintaining or reducing the sentence, seems to favour the opposite view. The appellate Court has the whole of the evidence before it, and if it can order a re-trial, or alter the finding on the appeal of the accused, why may it not order a re-trial on the charge on which the first Court acquitted the accused, or find the accused guilty on the charge on which he was acquitted by the first Court? No doubt it might be said that this would violate the salutory principle which protects with jealous care orders of acquittal from interference except in a special way, that is, on appeal by the Local Government. But the principle would practically be left unimpaired in the majority of cases even if the appellate Court alters the finding in the way stated above by the express provision in cl. (*b*), s. 423 against enhancement of sentence. While thus, on the one hand, the construction **[381]** we put upon cl. (*b*), s. 423 of the Criminal Procedure Code will not be likely to lead to any prejudice to the accused, on the other hand, it is obviously necessary in the interests of justice that that construction should be put upon it, as otherwise great miscarriage of justice might result. Thus, suppose that the accused is charged with theft and criminal breach of trust in

respect of the same property, and that the first Court acquits him of the former offence and convicts him of the latter. If on appeal by the accused the appellate Court finds that the accused had never been entrusted with the property, but that he stole it, it cannot affirm the conviction for criminal breach of trust; and if it is precluded from convicting him of theft by reason of the acquittal by the first Court, the accused must be acquitted altogether. Such a result, which would be inevitable, unless cl. (*b*) of s. 423 is construed in the way we have indicated, could never have been intended by the Legislature, which has taken so much care to provide (see ss. 236 and 237 of the Code of Criminal Procedure) against any similar failure of justice in cases where it is doubtful which of two or more offences is constituted by the acts of the accused.

There is one other way of viewing the matter which will make it clear the construction we have put upon cl. (*b*) of s. 423 is the only one that it should bear. If the contention of the appellants were correct that the acquittal on the charge of murder was final and incapable of being interfered with in the appeal by the accused from the conviction for grievous hurt, and must be a bar to any further trial for murder or culpable homicide not amounting to murder, it would equally well be a bar under the first paragraph of s. 403 to any fresh trial for grievous hurt. This would be manifestly absurd, and would render s. 423, cl. (*b*), and s. 403 incompatible with one another. When an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. The interference of the appellate Court in such a case is directed **[382]** primarily, not against the acquittal, but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the appellate Court must deal with the whole case. And this becomes more than ordinarily necessary, in a case like the present, where the trial is by jury. Here if the verdict is found to be erroneous, owing to a misdirection by the Judge, it must be set aside in its entirety, as the appellate Court cannot go into the facts (see s. 418 of the Code of Criminal Procedure), and substitute its own verdict for that of the jury. There was some discussion as to what was meant by the verdict in s. 423, cl. (*d*)—Mr. Allen, for the appellants, contending that it meant the verdict upon each charge separately, and Babu Ram Churn Mitter, for the Crown, urging that it meant the entire verdict on all the charges collectively. Having regard to the provisions of ss. 300 to 307 of the Code of Criminal Procedure, we think the "verdict" in s. 423, cl. (*d*) means the entire verdict on all the charges.

Where, therefore, the appellate Court reverses the verdict of a jury and orders a re-trial, unless it has limited the scope of the re-trial, such re-trial must be taken to be one upon all the charges originally framed.

This brings us to the consideration of the second point, namely, whether, as a matter of fact, this Court ordered a re-trial of the whole case. In its judgment it no doubt simply sets aside the conviction and directs a re-trial. But as we have said above, this, in the absence of any express limitation, must be taken to mean a re-trial of the whole case.

We wish it to be distinctly understood that what we have said above is intended to apply only to those cases which are contemplated by s. 236 of the Code of Criminal Procedure, and in which the accused is charged

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with different offences arising out of a single act or a series of acts, it being doubtful which of those offences the act or acts constitute, and the accused is convicted by the first Court of one of these and acquitted of the others. Where an accused person is charged at one trial with distinct offences constituted by distinct acts, such as the causing of death to *A* and of grievous hurt to *B*, or the forgery of document *A*, **[383]** and that of document *B*, and he is acquitted of one of these offences and convicted of the other, a different principle would, we think, apply. That is not the kind of case we have before us, and we do not here determine anything with reference to cases of that class.

From what has been said above, it would follow that the former acquittal on the charge of murder is no bar to the present trial, for this simple reason, that that acquittal is no longer in force having in effect been set aside by the order for re-trial made by this Court on the appeal of the accused.

Babu Ram Churn Mitter, for the Crown, relied upon a further reason for holding that the previous acquittal was no bar to the present trial, *viz.*, that the previous acquittal was on a charge of murder, whereas the present trial is for culpable homicide not amounting to murder. We do not consider this argument sound, as it appears from the first paragraph of s. 403 of the Criminal Procedure Code, that a previous acquittal for an offence is a bar to a trial on the same facts for any other offence for which a different charge might have been made under s. 236 of the Criminal Procedure Code.

It remains now to consider the second ground urged on behalf of the appellants, namely, that relating to misdirection by the Judge. The misdirections are said to consist in the Judge not having properly explained to the jury, first, the distinction between murder and culpable homicide; and, secondly, the meaning and effect of s. 149 of the Indian Penal Code. As to the first we do not think that there is any misdirection at all, and even if there had been any misdirection, it could not possibly have prejudiced the accused, seeing that the verdict is one of guilty on the charge of culpable homicide not amounting to murder.

As to the second, it is not contended that the Judge gave any wrong direction to the jury. What it is urged is that he did not explain to them the meaning of s. 149 of the Indian Penal Code, as fully as it has been explained by a Full Bench of this Court in *The Queen* v. *Sabed Ali* (1). Considering that there has been much discussion, and some difference of opinion, regarding the meaning of s. 149 of the Indian Penal Code, it would certainly **[384]** have been better if the Judge had explained that section to the jury somewhat more fully. But what the learned Judge said in his charge in explaining s. 149 of the Indian Penal Code, though concise, is in our opinion quite sufficient and clear. We do not think that there was any misdirection in the Judge's charge to the jury.

The two grounds urged before us, therefore, both fail. We see no reason for interfering with the convictions and sentences, and we accordingly dismiss the appeal.

H. T. H. *Appeal dismissed.*

(1) 11 B.L.R. 247 = 20 W.R. Cr. 5.

22 C. 384.

1895
JAN. 18.

CRIMINAL REVISION.

22 C. 384.

CRIMINAL REVISION.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

GIRIDHAR CHATTERJEE, AGENT OF NABIN CHANDRA GANGULY (*First Party, Petitioner*) v. EBADULLAH NASKAR AND OTHERS (*Second Party, Opposite Party*).*
[18th January, 1895.]

Criminal Procedure Code (Act X of 1882), s. 148, para. 3—Assessment of costs by Magistrate other than the Magistrate passing the decision and making the order for costs—Application within reasonable time.

Where a decision has been given in a case under s. 145 of the Criminal Procedure Code, and an order for costs has been made at the same time and by the same Magistrate, there is no objection to the amount of such costs being afterwards assessed by a different Magistrate if an application for that purpose is made to him within a reasonable time.

Bhojal Sonar v. *Nirban Singh* (1), distinguished.

[F., 23 C. 37 ; R., 29 M. 373 (375) ; 11 Cr.L.J. 335=5 Ind. Cas. 943=13 O.C. 66.]

THE petitioner instituted criminal proceedings under s. 145 of the Criminal Procedure Code, and on the 13th of December 1893 an order was made in his favour by the Deputy Magistrate of Diamond Harbour, and by the same order the petitioner was allowed the costs of the proceedings under s. 148. The costs, however, were not assessed till the 14th day of March 1894, when the second party was directed to pay a certain sum. But [385] as this was done without notice to, and in the absence of, the second party, the order of the Deputy Magistrate assessing costs was set aside by the High Court, and the case was sent back in order that the Deputy Magistrate might deal with the case according to law upon notice to the second party. The Deputy Magistrate who made the order for costs had, however, in the meantime been transferred to another district, and his successor, on the 27th August, refused to assess the costs, the order for which was made by his predecessor. The petitioner applied to the High Court and on the 26th day of October obtained a rule calling on the opposite party to show cause why the order of the Deputy Magistrate should not be set aside.

Babu *Boido Nath Dutt*, for the petitioner, in support of the rule.—The Deputy Magistrate, when he passed his decision under s. 145 of the Criminal Procedure Code, also made the order for costs under s. 148. Assessing costs is a mere ministerial work, and can be done by the successor in office. In civil suits the Judge deciding the case awards costs and the taxing officer taxes the costs.

Babu *Sarat Chundra Rai*, in showing cause against the rule, relied on the case of *Bhojal Sonar* v. *Nirban Singh* (1), where it was held that a successor in office had no jurisdiction to make an order assessing costs.

The following judgments were delivered by the Court (BEVERLEY and BANERJEE, JJ.) :—

JUDGMENTS.

BEVERLEY, J.—The facts in this case are these: On the 13th December 1893 an order was made in favour of the petitioner under s. 145 of the

* Criminal Revision No. 640 of 1894, against the order passed by Baboo Khagendra Nath Mitter, Deputy Magistrate of Diamond Harbour, dated the 27th day of August 1894.

(1) 21 C. 609.

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Code of Civil Procedure, and by the same order he was allowed the costs of the proceeding under s. 148. The costs, however, were not assessed till the 14th March 1894, when the second party was directed to pay a certain sum. That order was set aside by this Court on the 9th May, on the ground that it had been made in the absence of the second party, and the case was sent back "in order that the Deputy Magistrate might deal with the case according to law upon notice to the petitioner." The Deputy Magistrate, who made the order for costs, had, however, **[386]** in the meantime been transferred to another district; and his successor on the 27th August refused to assess the costs, the order for which was made by his predecessor.

On the 26th October the petitioner obtained this rule, calling on the other side to show cause why the Deputy Magistrate's order of the 27th August should not be set aside, and why he should not be directed to assess the costs.

The Deputy Magistrate's order, no doubt, followed the decision in *Bhojal Sonar* v. *Nirban Singh* (1), to which I was a party, and in which it was held that a Magistrate "had no jurisdiction to assess the costs more than two years after the order for costs had been made by his predecessor." In that decision reference was made to another case, in which it was held that it is only the Magistrate who passes the decision under s. 145 who is authorised to make an order as to payment of costs under s. 148.

In the case of *Issur Chowdhry* v. *Bibijan Khatun* decided by Macpherson and Banerjee, JJ., on 5th January 1891, those learned Judges expressed the opinion that an order for costs ought to be made at the time of the decision, but the matter was decided on another ground.

In the present case the order for costs was made at the time the decision was passed and by the same Magistrate who passed the decision. That being so, I think there is no objection to the costs being assessed by a different Magistrate, if application is made to him within a reasonable time. In the case of *Bhojal Sonar* v. *Nirban Singh* (1), what mainly influenced me in refusing to interfere was the great delay that had been allowed to occur between the order for, and the assessment of, the costs, though I am bound to add that Mr. Justice Hill is still of opinion that that decision was right as a matter of law.

The provision in question is of a *quasi* civil character, and indeed the language of the section appears to have been borrowed from s. 219 of the Code of Civil Procedure, and it is not necessary in civil cases that the costs should be assessed or taxed at the time of the decision, or by the same officer who decided the case.

[387] I am accordingly of opinion that the rule should be made absolute. to set aside the order of the Deputy Magistrate of 27th August 1894, and to direct him to assess the costs according to law.

BANERJEE, J.—I concur.

S. C. B. *Rule made absolute.*

(1) 21 C. 609.

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Before Mr. Justice Beverley and Mr. Justice Banerjee.

BINODA SUNDARI CHOWDHURANI (*Petitioner*) *v.* KALI KRISTO PAL CHOWDHURY AND OTHERS (*Opposite Party*).*
[18th January, 1895.]

Criminal Procedure Code (Act X of 1882), s. 148, para. 3—"Magistrate passing a decision," Meaning of Order for costs.

The award of costs under s 148 of the Code of Criminal Procedure is a *quasi* civil proceeding, and should be made by the Magistrate at the time of passing his decision under s. 145, in the same manner as under s. 218 of the Code of Civil Procedure the order for costs of any application should be made when the application is disposed of.

Where, however, the decision under s.145 was passed on 19th December 1893, and the application for costs was made on 21st December, but owing to delay arising from the action of the objectors the order for costs was not made until 16th June 1894, but then by the same Magistrate who passed the order under s. 145: *Held*, that the order was not void for want of jurisdiction, and, there being no suggestion that it was unjust or improper on the merits, the Court declined to interfere with it in the exercise of their discretionary power of revision under s. 439.

[R., 29 M. 373 (375); 10 C.W.N. 1030 (1031); 11 Cr.L.J. 335=5 Ind. Cas. 943=13 O. C. 66; 15 C.W.N. 811=12 Cr.L.J. 376=11 Ind. Cas. 144.]

KALI KRISTO PAL CHOWDHURY and others instituted proceedings under s. 145 of the Code of Criminal Procedure and were retained in possession by an order of the Deputy Magistrate of Dacca, dated the 19th of December 1893. Two days after, *i.e.*, on the 21st of December, they applied for costs under s. 148, para. 3. This application was not taken up and disposed of at once, but was postponed at the request of some of the opposite party, pending the result of a motion to the High Court against the order of the 19th December in the original proceedings. Eventually on the 16th of June 1894 the costs were assessed, and adjudged to be payable to the party retained in possession. On the 14th of August 1894, two of the opposite party, Soshi Mohun and **[388]** Lal Mohun, applied to the High Court to have the order for costs set aside, but that application was refused. On the 3rd of September the present petitioner, Binoda Sundari, made a similar application and obtained a rule.

The Advocate-General (Sir *Charles Paul*), for the petitioner, in support of the rule.

Mr. *M. Ghose*, for the opposite party, showed cause.

Mr. *M. Ghose.*—The petitioner Binoda Sundari never appeared in the original proceedings, and she is not bound by the Deputy Magistrate's order, therefore she has no *locus standi* here. [BANERJEE, J.—The fact of Binoda's not appearing does not exempt her from paying costs.] The application of two of the opposite party for setting aside the order for costs, having been rejected on the 14th of August last, the Court had no power to entertain a similar application by the present petitioner on the 3rd of September. The principal point in this case is whether the Magistrate, having finally disposed of the proceedings under s. 145 of the Code of Criminal Procedure on the 19th of December, had any power to make an order for costs under s. 148 on a subsequent date. There is no warrant for the proposition that he cannot. The words

* Criminal Revision No.507 of 1894, against the order passed by Babu Jnan Sankar Sen, Deputy Magistrate of Dacca, dated the 16th of June 1894.

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"Magistrate passing a decree" in s. 148, para 3, means the Magistrate who passed the decision, who had the facts of the case before him; they cannot be limited to mean "at the time of passing the decision"—*cf.* s. 106 of the Code of Criminal Procedure; there the words "at the time of passing the sentence" appear distinctly.

The *Advocate-General* in support of the rule.—Binoda's (petitioner) not appearing in the original proceedings makes no difference. The order was upon the first party to pay the costs and she was one of the first party.

It has been urged that the application of two of the first party having been refused, this Court had no power to entertain a similar application by the present petitioner. But the petitioner was not a party to the former application, and I mentioned the fact of that application being refused to the learned Judges (Petheram, C.J., and Beverley, J.) who gave me this rule.

[389] The third point is: Could the Magistrate pass an order as to costs under s. 148 of the Code of Criminal Procedure some time after passing his decision under s. 145? "Magistrate passing a decision" must mean "at the time of passing the decision;" some limitation must be placed as to time. It cannot be said that the order could be passed 20 years after. A Criminal Court becomes *functus officio* as soon as it passes its order. There is no review of judgment in a criminal case. I rely upon the judgment of Macpherson and Banerjee, JJ., in *Issur Chowdhry* v. *Bibijan Khatun*, an unreported case, dated the 5th of January 1891. There the learned Judges said: "We are disposed to hold that the order as to costs and possession must be made at the same time." In the case of *Bhojal Sonar* v. *Nirban Singh* (1) it was held that a successor in office could not pass the order for costs; *cf.* s. 433 of the Code of Criminal Procedure which says: "The High Court may direct by whom the costs of the reference shall be paid." It must mean at the time of passing the principal order, and not at a subsequent time. In civil suits if costs were not ordered to be paid at the time of passing judgment, could costs be applied for afterwards? Judgment is not delivered one day and the order for costs made on a future occasion. It is done all at once,

The judgment of the Court (BEVERLEY and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This rule arises out of a proceeding under s. 145 of the Criminal Procedure Code in which Binoda Sundari Chowdhurani, the petitioner before us, was one of certain objectors, described as Soshi Mohun Pal Chowdhury and others, the applicants in the proceeding being Kali Kristo Pal Chowdhury and others. The proceedings terminated in favour of the applicants on December 19th, 1893, and two days after, namely on December 21st, 1893, the applicants applied for costs under s. 148. This application was not taken up and disposed of at once, but was postponed at the request of Soshi Mohun Pal Chowdhury and others, pending the result of an application to this Court in the original proceedings, but on June 16th, 1894, the costs were assessed and were adjudged **[390]** to be payable by the objectors Soshi Mohun Pal Chowdhury and others to the applicants.

On the 14th August Soshi Mohun Pal Chowdhury and Lal Mohun Pal Chowdhury applied to this Court to have the order set aside, but that application was refused.

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On the 3rd September, the present petitioner, Binoda Sundari, made a similar application, and obtained a rule which the learned Advocate-General now seeks to support on the ground that the Magistrate, having disposed of the proceedings finally on December 19, 1893, had no jurisdiction to make an order for costs on a subsequent date.

It seems that the present petitioner never appeared in the original proceedings, and it is therefore contended by Mr. Ghose, who shows cause, that she is not bound by the Magistrate's order and has no *locus standi* in this Court. But it seems clear that she was one of the objectors described as Soshi Mohun Pal Chowdhury and others in the proceedings, and that as such she is liable for the proportion of the costs which that set of objectors was adjudged to pay.

Mr. Ghose next urges that the application of Soshi Mohun Pal Chowdhury to this Court, having been rejected on the 14th August last, the Court had no power to entertain a similar application by the petitioner on the 3rd September. In answer to this contention, it is sufficient to say that the petitioner now before us was not a party to the application of August 14th.

Upon the merits the Advocate-General has relied on an unreported case, *Issur Chowdhry* v. *Bibijan Khatun*, decided by Macpherson and Banerjee, JJ., on the 5th January 1891. In that case the learned Judges expressed the opinion that an order for costs ought to be made at the time of passing the decision, but the case was actually decided upon another ground. The words of s. 148 are as follow: "When any costs have been incurred by any party to a proceeding under this chapter for witnesses' or pleader's fees, or both, the Magistrate passing a decision under s. 145, s. 146 or s. 147, may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion."

[391] The learned Advocate-General contends that the words "*the Magistrate passing a decision*" should be construed to mean not merely the Magistrate who passes the decision, but at the time of passing the decision. This view derives some support from the corresponding sections in the Code of Civil Procedure (ss. 218, 219), from the latter of which sections the words of s. 148 appear to have been borrowed. Section 218 of the Code of Civil Procedure appears to require that the order for costs of any application should be made when the application is disposed of, unless for any reason the consideration of the matter is reserved for any future stage of the proceedings. The award of costs under s. 148 of the Code of Criminal Procedure is a *quasi* civil proceeding, and we think the same rule should prevail.

In the present case the decision was passed on December 19th, 1893, and the application for costs was made on the 21st, and although that application was not disposed of, and the order for costs was not made, till June 16th, 1894, the delay was due to the action of the objectors. That being so, and the order for costs having been made by the Magistrate who passed the order under s. 145, we cannot say that the order was void for want of jurisdiction; and, having regard to all the circumstances of the case, and there being no suggestion that the order is unjust or improper on the merits, we do not think that this is a fit case for our interference in the exercise of our discretionary power of revision, under s. 439 of the Code of Criminal Procedure.

We accordingly discharge the rule.

S. C. B. *Rule discharged.*

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Before Mr. Justice Banerjee and Mr. Justice Sale.

BALMAKAND RAM (*Petitioner*) *v.* GHANSAMRAM (*Opposite-party*.)*
[27th October, 1894.]

Criminal trespass—Penal Code, ss. 441, 456, 457, 509—*Lurking house trespass by night—Intention—Charge, Specification of intention in—Revision, Powers of High Court in—Criminal Procedure Code* (1882), ss. 221, 222, 439, 537.

[392] A conviction for lurking house trespass by night under s. 456 of the Penal Code is not bad for want of the specification of the intention in the charge, but one under s. 457 cannot be sustained without such specification. In a charge under the former section, though a guilty intention must be proved, it is not necessary to prove which of the several guilty intentions the accused had; it will be enough if it is shown that the intention must have been one or other of those specified in s. 441, though it may not be certain which it was.

An accused person, the landlord of a house in which he occupied the lower flat, was found in the middle of the night in the room of the complainant, one of his tenants, upstairs, in which the complainant and his wife were at the time sleeping. Upon being detected the accused was subjected to very severe treatment, but did not utter a word of protestation of innocence, or make any show of remonstrance, and when questioned said "I have committed a fault, pardon me." He was arrested upon a charge under s. 456 of the Penal Code, the criminal intention alleged being that of committing theft. The charge framed by the Magistrate did not specify any intention, and the Magistrate came to the conclusion that the trespass was not committed by the accused, who was a wealthy man, with that intention. He found, however, that the complainant had suppressed some important facts, and that he was not in his wife's room when the accused entered it, and relying on the decision in *Koilash Chandra Chakrabarty* v. *The Queen Empress* (1), he convicted the accused. On appeal the Sessions Judge, though finding that the Magistrate's views were against the evidence, upheld the conviction without finding what specifically was the intention with which the entry was made. In revision, it was contended that the conviction was bad—(1) because no guilty intention was set out in the charge; (2) because no such intention was proved by the evidence; and (3) because no such intention was specifically found by the Sessions Judge.

Held, that the first contention was unsupportable for the reasons above stated. Even if it had been necessary to specify the intention in the charge, it would have to be shown under the provisions of s. 537 of the Code of Criminal Procedure that the omission had occasioned a failure of justice, and having regard to the nature of the charge and the line of defence adopted, the accused had not in any way been prejudiced in his defence.

Held, as regards the second contention, that though it was not certain what the precise intention of the accused was in committing the trespass, it was clear that it must have been with one or other of the intentions specified in s. 441 of the Penal Code, as, judging from the time, the place, and manner in which the trespass was committed, and the conduct of the accused when discovered, it was impossible to suppose that the trespass **[393]** could have been committed either unintentionally or with any innocent intention, and that it must have been committed with the intention of committing some offence, but that the accused was entitled to have it taken that it was with the least possible culpable intention, namely, that of committing an offence under s. 509 of the Penal Code.

Held, as regards the third contention, that in exercising its powers under s. 439 of the Code of Criminal Procedure, it is open to the High Court to alter any finding and confirm a conviction, and that if the evidence on the record in a case be sufficient to warrant a conviction, the Court would not be justified in setting such conviction aside, merely because the view taken of the evidence by

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* Criminal Revision No. 598 of 1894, against the order passed by F. W. Badcock, Esq., Sessions Judge of Bhaugulpore, dated the 26th of September 1894, affirming the order passed by Babu Sham Lal Gupta, Deputy Magistrate of Monghyr, dated the 3rd day of September 1894.

(1) 16 C. 657.

the lower Court is not sustainable, or some fact which ought to have been found by that Court is not found, or found incorrectly.

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[F., 22 C. 994 (998) ; 127 P. R. 1905=2 Cr. L. J. 279=18 P. R. 1905, Cr. ; R., 23 A. 124 (126)=21 A.W.N. 16 ; 29 A. 46=3 A.L.J. 652 (653)=A. W. N. (1906) 279=4 Cr. L.J. 291 ; 4 Cr. L.J. 293=12 P. R. 1906, Cr. 56=54 P.L.R. 1907 ; 10 Cr L. J. 104=3 Ind. Cas. 895=3 S.L.R. 86 (87) ; D., 4 C.L.J. 169 (170).]

THE petitioner in this case was charged with lurking house-trespass by night under s. 456 of the Penal Code, and convicted by the Deputy Magistrate of Monghyr, and sentenced to six months rigorous imprisonment.

The facts of the case are fully stated in the judgment of the Deputy Magistrate, which was as follows :—

"(1) The parties are respectable Marwari merchants of this town, and the accused is a man of wealth. He is the landlord of the complainant, having let out to him the upper storey of the same house on the ground floor of which he has his own shop and godown. This upper storey consists of two rooms only, a verandah to the south, and a small terrace (miscalled verandah by some witnesses) to the north. Here the complainant lives with his family, *i.e.*, his wife aged about 25 years, his mother aged about 60 years, and a little child aged about 3 years. The accused visits his shop occasionally, and stops there for two or three days each time.

"(2) The complainant's story is that at about one o'clock on the night of the occurrence, he was roused by some vague sound in his room where he was sleeping with his wife. As soon as he woke he saw a man in the room standing within two cubits only from his bed. He asked 'who are you'? the man tried to run away, on which he seized him at once and recognized his landlord, Balmakand in the light of a *chirag* which was burning in the wallshelf in the room. He asked the accused nothing as to what had brought him there at that unearthly hour, but at once gave the alarm 'thief.' The chain of the window leading from the northern terrace into the room was at the same time found unfastened, and it can be unfastened from outside by passing one's hand through the shutters. The accused being caught made a struggle for escape. The thannah is within a *russi* from the house, and the locality being an important part of the town, is unusually well guarded by police at night. Three constables and one head-constable came up in quick [394] succession on hearing the complainant's alarm and some neighbours also came. The accused was taken to the thannah.

"(3) The story must strike anybody at first sight as highly improbable, but it is this apparent improbability of the case which seems to me a guarantee of its truth in the main. Obviously the complainant has suppressed some most important facts, and distorted others from a motive of concealing the real intention of the accused in committing the trespass, but it is impossible not to hold on the evidence adduced that he has successfully proved the trespass itself. In his first information to the police he distinctly suggested an intention of theft, but he found soon enough that such an intention would not be believed in by any Court in the case of a man of the accused's position. So when he came to Court, he modified his suggestion by saying "I can't say what the accused's motive was, but I cried out 'thief, thief.' He had nothing in his hand and no article of mine has been stolen." He admits also that the accused is a rich man, suggesting thereby that theft could not be a likely intention. Strangely enough he never asked the accused what had brought him there

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at that hour; why should he ask? Surely he knew too well what the accused's motive was, and he needed no enlightenment from him. This is the only intelligent explanation of his apparently strange conduct.

"(4) In a case like this, when the complainant on the one side makes a desperate attempt by suppressing and perverting facts to conceal the true intention of the accused, and the accused on the other hand naturally tries to hoodwink the Court as to the whole occurrence, the question of intention should be taken up last of all. The first questions to be determined are (*a*) whether the trespass, irrespective of the question of intention, has been proved satisfactorily; (*b*) whether any sufficient motive can be seen on the complainant's part for bringing a false case of this nature against the accused; and (*c*) whether, having regard to the relationship between the parties, the social position of the accused and other similar circumstances of the case, it is at all probable that the complainant, if he were determined to entangle the accused in a false case, would bring an apparently absurd charge like this—a charge of theft against a man worth Rs. 30,000.

"(5) With regard to the first question, I hold that there can be but one opinion, namely, that the evidence of trespass is conclusive. I do not see why police witnesses must be disbelieved. In fact it would seem that if the police have been befriending any party in this case, it is the accused and not the complainant. For it is difficult to see why otherwise they would send up a case like this under s. 448 of the Penal Code. Evidently the police wanted to leave a loop-hole for the parties to compound the case, and also some chance of the accused's release on bail. The accused was caught bare-headed and bare-footed in the room with some gold ornaments on his person. The complainant caught him, threw him on the ground and sat upon him. There was a struggle. The complainant's **[395]** mother comes up and asks 'Hallo Balmakand what is this?' Balmakand replies pardon me, '*kasoor hogia mafkare.*' I cannot but disbelieve the witnesses for the defence, who say that they saw the parties struggling on the *angun* (court-yard) downstairs. The manner of his arrest described by the accused is absurd and utterly unworthy of belief. I may only add in this connection that the pleader of the accused, when arguing the case before charge, was obliged to admit the trespass; the evidence in this connection being obviously in his opinion invincible. He simply tried to break down the case by quibbles.

"(6) With regard to the second question, the motive for a false case assigned by the accused is utterly insufficient for the purposes of his case. The accused had wanted the complainant to quit his house, the, complainant did not agree to quit at once; there was a dispute about this and hence the complainant catches the accused at one o'clock in the night on the *angan* of the house downstairs, which is admittedly in the possession of the accused, and then sends him to the thannah on a false charge of lurking house-trespass and theft. Surely no sane person could believe this.

"(7) With reference to the third question, it is evident that the charge on which the accused has been sent up, if utterly false, would have been the last thing for the complainant to think of if he were determined to entrap him (his landlord) in a false case. A premeditated false case is always found to be outwardly plausible,and not a string of patent absurdities such as the complainant's case evidently is.

"(8) The question of intention must now be taken up, and here lies certainly the great crux in the case. Obviously and admittedly I might say

theft was not the intention of the accused. What then was his intention? It would appear from the ruling of the Calcutta High Court in the case of *Koilash Chandra Chakrabarty* v. *The Queen Empress* (1)—a case which seems to me on all fours with the present case—that the complainant is not bound in every such case to assign some particular motive to the accused, nor is the Court bound to find some specific motive in terms. The trespass being proved, the *onus* it would seem is shifted on the accused. But still it won't do under any circumstances for the complainant to prove, or for the Court to find *simply* the fact of trespass. Certain circumstance there must be in every case of criminal trespass which lead to a presumption of some particular unlawful motive, or which at any rate do not preclude the presumption of some particular unlawful motive. Are there any such circumstances in the complainant's case? There are none, I must say, if the whole of the complainant's story is believed. But why should the whole of it be believed when obviously the complainant has made throughout a desperate attempt to conceal and distort all facts in connection with the accused's intention from a motive of natural delicacy and a fear of social dishonour. Believing, [396] as I do, the evidence of trespass, I feel bound to presume, from the circumstances of the case that the complainant has distorted one very important fact, the revelation of which would have made the whole case as clear as noonday. That fact is to be found in the accused's statement before the police, but of course that statement being inadmissible as evidence under the law (s. 162 of the Criminal Procedure Code) cannot be referred to here. I hold, however, that quite irrespective of that statement the very absurdity of the circumstances related by the complainant, taken along with the conclusiveness of the evidence of trespass, leads to a presumption of that fact which the complainant has so perversely distorted. The complainant's story, of course, is that he was sleeping on the same bed with his wife. A *chirag* was burning in the room, yet the accused was there standing quietly within a cubit from the bed. The obvious absurdity of this story seems to me a sufficient ground (taken along with other circumstances of the case) for a presumption that the complainant's statement, that he was in the room sleeping with his wife, is an utter falsehood, proceeding from an obvious motive. He was not really in the room. He came from outside the room at any rate, and probably from outside the house. He saw the accused with his wife, and then followed everything that he has related and proved. The circumstances of the case are such that a presumption like this appears to be not only justified by s. 114 of the Evidence Act, but almost unavoidable, and once this fact is presumed the whole case, as already stated above, becomes clear as the noonday sun.

"(9) The only material difference between this case and the case of *Koilash Chandra Chakrabarty* v. *The Queen Empress* (1) vanishes on this simple presumption, and what remains then in this case is exactly what the High Court had to deal with in that case. It is the case of a man, a stranger who, uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances it has been ruled by the Calcutta High Court 'a Court ought to presume that the entry was

(1) 16 C. 657.

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effected with an intent, such as is provided for by s. 441 of the Penal Code.' The fact of the accused being not a stranger, it will be seen, makes no difference in the present case, and the question of invitation or no invitation does not arise here at all. All the other elements of the two cases *are on all fours*.

"(10) There can be no question on the presumption made above, and under the above circumstances of the case, that the trespass was a 'lurking' one.

"(11) I find the accused guilty under all the above circumstances of an offence under s. 456 of the Indian Penal Code, and having regard to **[397]** the gravity of the offence, sentence him to undergo six months' rigorous imprisonment."

The petitioner appealed to the Sessions Judge against this conviction and sentence. His appeal was, however, dismissed, the Sessions Judge giving the following reasons :—

"The complainant and the accused are Marwaris. The former rents the upper storey of a house from the accused, who resides occasionally in the lower storey. The complainant's case is that on August 6th at midnight he was asleep in his room with his wife, a lamp being in the room. He woke up and saw the accused standing by his side. He seized him, and several constables came attracted by his voice and a complaint was laid at the thannah.

"The accused's case is that he was sleeping below. He heard a noise and went to fasten the sudder door. The complainant came down and caught hold of him.

"The Deputy Magistrate has convicted him under s. 456 of the Indian Penal Code. He finds that the complainant has suppressed some most important facts, that he was not in his wife's room, but probably came from outside the house, and that he found the accused and his wife together. The Deputy Magistrate may be right in his view of what took place, but it is absolutely opposed to all the evidence on the record.

"I think it is most clearly proved that the accused was actually seized in the upper storey of the house and not in the lower storey. It is equally clear that he had no business there. I think that the case of *Koilash Chandra Chakrabarty* v. *The Queen-Empress* (1) applies, and there is not the slightest evidence that the complainant's wife invited the prisoner to her room. There is not the least reason why any of the police witnesses should depose falsely, and this is a class of false cases which no decent man would start. No doubt with a view to shield his wife, he has not told the whole truth, but I do not see any reason why he should be disbelieved as to the main fact that the accused was found in his wife's room at midnight. On the authority of the ruling quoted above it appears that in such a case it is for the accused to explain what he was doing there. The appeal is dismissed."

The petitioner then moved the High Court under the provisions of s. 439 of the Code of Criminal Procedure to send for the record and set aside the conviction on, amongst others, the following grounds :—

(1) That the Deputy Magistrate having wholly disbelieved, not only the story of the complainant, but also the intent suggested by him, was wrong in convicting the petitioner on a mere surmise **[398]** without finding any intent based upon the evidence on the record.

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(1) 16 C. 657.

(2) That the intent of the alleged entry, not having been set out in the charge, the petitioner was seriously prejudiced in his defence.

(3) That the lower Courts were wrong in presuming that the intent must have been unlawful from the mere fact of the entry.

(4) That the burden lay upon the prosecution to prove affirmatively what the intent of the accused was, and, the prosecution having failed to prove that, the petitioner ought to have been acquitted.

(5) That the view taken by the Sessions Judge was erroneous, specially as he was unable on the evidence to find a specific intent.

(6) That the Deputy Magistrate erred in referring to a statement said to have been made by the petitioner to the police, which admittedly was not evidence, and that his judgment proceeded upon inferences and presumptions based upon the said alleged statement which did not form part of the record.

On that application a rule was issued which now came on to be heard.

Mr. *M. Ghose* and Mr. *St. John Stephen*, in support of the rule, for the petitioner.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*), for the Crown.

Mr. *M. Ghose*.—On the finding of the first Court, as regards the intent of the accused, which finding is absolutely opposed to the evidence according to the appellate Court, the petitioner was entitled to an acquittal, the Judge on appeal having failed to find any intent, such as specified in s. 441 of the Penal Code. Such intent must be expressly alleged, proved, and found, and the burden of proving it is clearly upon the prosecution. The mere entry does not imply criminal intent; there must be circumstances proved, from which such intent may be inferred. [*Reg.* v. *Woodfall* (1), per Lord Mansfield, and *Rex.* v. *Philipps* (2).] This is not one of those cases where the prosecution, by the **[399]** mere allegation of an act, can call upon the accused to show what his intention was. When the statutory definition of a crime makes a particular intent a necessary ingredient, such intent must be proved by the prosecution, and there is no *onus* on the accused. [*Reg.* v. *Dart* (3), *Reg* v. *Gray* (4), *Reg.* v. *Sleep* (5).] Formerly in England it was necessary to prove intent even in cases when men were found with implements for house breaking on their persons, but the burden of proving the absence of guilty intention was thrown on the accused by Statute (24 and 25 Vict., cl. 96, s. 58). This shows that under the Penal Code a criminal intent is not implied by a mere entry, but that it must be proved in the case of criminal trespass. It cannot be implied merely because a man is found in another's house at a late hour.

Trespass resulting in annoyance, or likely to do so, is not enough—see *In the matter of the petition of Shib Nath Banerjee* (6), where the accused was found in a gentleman's bath room where he had gone at the request of a female servant. [See also *In re Gobind Prasad* (7), *Shumbhunath Sarkar* v. *Ram Komul Guha* (8), *The Empress* v. *Panjab Singh* (9)].

The requisite intent must be expressly found, and not left to inference or conjecture. [*In the matter of the petition of Durgaiya* (10), *Anonymous Case No. 52 of 1869* (11)]. The case of *Koilash Chandra Chakrabarty* v. *The Queen-Empress* (12) is clearly distinguishable. In that case the

(1) 5 Burr. 2667.
(2) 6 East. 473.
(3) 14 Cox. 143.
(4) 17 Cox. 299.
(5) L. and C. 44.
(6) 24 W R. Cr. 58.
(7) 2 A. 465.
(8) 13 C. L. R. 212.
(9) 6 C. 579.
(10) Weir, 3rd. Ed. p. 323.
(11) 5 M.H.C. App. 5.
(12) 16 C. 657.

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accused actually committed an assault and attempted to open a padlock; his intent could be presumed from his acts. Here the accused did nothing. The evidence does not preclude the hypothesis of the accused having been drunk or intoxicated. [BANERJEE, J.—Why does he not say so?] He might have been afraid of losing caste as a Jain, and he might not have set up a true defence. He might have been a somnambulist. The prosecution must exclude these possibilities.

[400] The charge did not specify any particular intent. The accused must be seriously prejudiced, if on revision he is to be found guilty of an intent of which he had no notice at the trial. The original intent alleged was to steal, but that is not proved. If the prosecutor and his wife are to be believed there was no intent to commit adultery. If such intent had been set out in the charge, the accused might have been able to prove connivance, or that there was no valid marriage. When it is doubtful whether an amendment of the charge will prejudice the prisoner it will not be made, *Reg.* v. *Govindas Haridas* (1). On appeal (and *a fortiori* on revision), the prosecution must be limited to the particular sense in which a charge has been understood at the trial. [*Empress* v. *Baban Khan* (2); Stephen's Hist. Crim. Law, p. 337].

Mr. *Leith* contended that under s. 106 of the Evidence Act the burden of proof was on the accused, and that the particular intent might have been to commit an offence under s. 509 of the Penal Code.

Mr. *Ghose* in reply.—Section 106 of the Evidence Act has no application to this case, where the intent is expressly stated as part of the definition of the crime. That applies only to cases when the accused sets up an intent in his defence, as in the case given in the illustration, regarding a man who is found without a railway ticket, but who alleges that he had purchased one. The intent here cannot have been to commit an offence under s. 509, namely, intruding upon the privacy of a woman, for that again must be done with the intent of insulting her modesty. The second part of the section is also governed by the general intent specified at the beginning of s. 509, otherwise getting into a lady's compartment without any such intent would amount to an offence. Proof must be given of the *mens rea*. The whole subject is fully discussed in *The Queen* v. *Tolson* (3); see the judgment of Mr. Justice Stephen. If the particular intent is not found, how is the punishment to be apportioned? The intent must be set out in the charge and found upon the evidence.

[401] The judgment of the High Court (BANERJEE and SALE, JJ.) was as follows:—

JUDGMENT.

The petitioner in this case has been convicted by the Deputy Magistrate of Monghyr of the offence of lurking house trespass by night, and has been sentenced under s. 456 of the Indian Penal Code to six months' rigorous imprisonment. He appealed to the Sessions Judge, but his appeal has been dismissed. He now asks us to interfere under s. 439 of the Code of Criminal Procedure, and set aside the conviction on the ground that, to constitute the offence of which he has been convicted, there must be criminal trespass, that is, trespass with one or more of the guilty intentions specified in s. 441 of the Indian Penal Code; that such intention must be specified in the charge, proved by evidence, and specifically found

(1) 6 B. H. C.Cr. 76. (2) 2 B. 142.
(3) L. R. 23 Q. B. Div. 168: 16 Cox. 629.

by the Court; and that as, in this case, no such intention is alleged, proved, or specifically found by the lower appellate Court, the conviction cannot stand.

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The facts of the case, as stated by the learned Sessions Judge, are shortly these: "The complainant and the accused are Marwaris. The former rents the upper storey of a house from the accused who resides, occasionally, in the lower storey. The complainant's story is that, on the 6th of August, at midnight, he was sleeping in the room with his wife; a lamp was burning in the room. He woke up and saw the accused standing by his side. He seized him, and then some constables came up attracted by his voice. The accused's case is, that he was sleeping below. He heard a noise and went outside the sudder door when the complainant came down and caught hold of him." The Deputy Magistrate found that the complainant had suppressed some important facts, that he was not in his wife's room, but probably came from outside the house, and that he found the accused and his wife together. The Deputy Magistrate, in the Judge's opinion, may be right in his view of what took place, but says the learned Judge, "It is absolutely opposed to all the evidence on the record." The Judge thinks, however, that "it is most clearly proved that the accused was actually seized in the upper storey of the house and not in the lower storey," and that "it is equally clear that he had no business there;" and then relying upon the [402] ruling of this Court in the case of *Koilash Chandra Chakrabarty* v. *The Queen Empress* (1), he affirms the conviction and sentence.

The contention of Mr. Ghose, who appears before us for the petitioner is, first, that the conviction is bad, because no guilty intention is set out in the charge, as it ought to have been; secondly, that it is also bad, because no such intention is proved by the evidence in the case; and, thirdly, that it is further bad in that no guilty intention is specifically found in the judgment of the lower appellate Court.

We shall deal with these contentions in their order.

In support of the first contention, that the conviction is bad, because no guilty intention is set out in the charge, reliance is placed on ss. 221 and 222 of the Code of Criminal Procedure, on a comment on the same by Sir James Stephen in his History of the Criminal Law of England, Vol. III, page 337, and on the cases of *Reg.* v. *Govindas Haridas* (2), and *Behari Mahton* v. *Queen Empress* (3).

This last mentioned case, we may observe, is a somewhat peculiar one. There the learned Judges held that in a charge of rioting it was necessary that the common object of the unlawful assembly should be set out. The common object that was set out in the charge was apparently not an unlawful one, and the learned Judges observe: "An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company," and then the learned Judges go on to add: "We are of opinion that the charge, as framed, discloses no offence. The common object of the unlawful assembly, as laid in the charge, was to resist the theft of crops by violence." The objection as to any omission in the charge is subject to the provisions of s. 537 of the Code of Criminal Procedure;

(1) 16 C. 657. (2) 6 B.H.C.Cr. 76. (3) 11 C. 106.

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and before effect can be given to any such objection, it must be [403] shown that the omission complained of has occasioned a failure of justice. But having regard to the nature of the charge and to the line of defence adopted in this case, which, according to the ruling cited from the Bombay High Court reports, is to be taken into consideration in determining this question, we do not think that the petitioner has in any way been prejudiced in his defence. Moreover, a comparison of ss. 456 and 457 of the Indian Penal Code would go to show that no specification of the intention is necessary for a conviction under the former section, though it must be proved that the intention was a guilty one. It is only where the charge is under s. 457 that the intention is to be specifically alleged and proved.

This view is supported by the observation of Mr. Justice Ainslie in the case of *The Queen* v. *Mehar Dowalia* (1), where that learned Judge says: "The charge under s. 451, if properly drawn, would have charged the accused with committing house trespass with intent to commit some specific offence, punishable with imprisonment, but as this was omitted, nothing remains in the charge or conviction, but the house trespass, and the maximum punishment for that under s. 448 is imprisonment for one year;" and then, for reasons which have relation to the facts of that case, the learned Judges thought that even that reduced sentence was not warranted by the finding of the Sessions Judge. And ss. 448 and 451 are related to one another very much in the same way as ss. 456 and 457 are to each other. A conviction under s. 456 would not, in our opinion, be bad for want of specification of the intention in the charge, though one under s. 457 could not be sustained without such specification.

Then as to the second contention, that the guilty intention must be proved, there can be no question that the prosecution must prove that the trespass was committed with a guilty intention, that is, with one of the different intentions specified in s. 441 of the Penal Code. But, in our opinion, it is not necessary to prove specifically which of the several guilty intentions the accused had; it will be enough if it is shown that the intention must [404] have been one or other of those specified in s. 441, though it may not be certain which it was.

In the present case, though it is not quite certain what the precise intention of the accused in committing the trespass which forms the subject of the charge was, it is clear that it must have been one or other of those specified in s. 441. One of them would probably be excluded by the circumstances attending the trespass, that is, the intention to annoy. Considering that the trespass was stealthily committed, it would not be reasonable to suppose that it could have been intended to annoy any of the persons in the room that was trespassed into, though such annoyance must have resulted from it. Nor could the intention of the accused have been to intimidate any one, as his subsequent conduct shows, for as soon as he was found out, he tried to make his escape quietly. But the intention must have been one to commit some offence, or to insult the modesty of complainant's wife by intruding upon her privacy. Judging from the time, the place, and the manner in which the trespass was committed, and the conduct of the accused when he was found out, it is impossible to suppose that the trespass could have been committed either unintentionally or with any innocent intention. It must have been

(1) 16 W. R. Cr. 63.

committed with the intention of insulting the modesty of the complainant's wife, or of committing some offence, though it is not quite certain what the offence intended was.

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Here it will be necessary to consider the case from each of the two points of view from which it may be viewed; first from the point of view of the first Court, according to which the trespass was committed into the sleeping apartment of the wife of the complainant in his absence; and secondly, from the point of view of the lower appellate Court, according to which it would not be right to adopt the view of the first Court, seeing that it was opposed to the evidence, and that it must be taken that the trespass was committed while the husband and the wife were sleeping together. But upon either view in the absence of any reasonable and probable suggestion as to what the intention of the entry could have been, the only rational inference, under the circumstances must be that it was made with the intention of committing some offence, in relation [405] to the wife of the complainant, the least heinous of which would be one under s. 509 of the Indian Penal Code, that is, intrusion upon her privacy to insult her modesty.

It was argued that the accused must have been prejudiced, if the intention was so uncertain that the Court was unable to find affirmatively what it was, and that if any specific intention had been alleged, it could have been disproved, just as the intention at first imputed by the complainant in his complaint to the police, namely, one of theft, has been disproved by the cross-examination of the witnesses tending to show that the accused is a man of such position that theft would be a most improbable motive. But here we must be guided, not by the undefined possibility of the accued having been prejudiced, but by some suggestion which a reasonable man can accept, that there has been prejudice to the accused. No reasonable suggestion has been made, and none occurs to us, as to how the accused, whose defence was an utter denial of the entry, could possibly have been prejudiced by reason of the absence of any specification of the intention with which the trespass was committed.

Great reliance was placed upon an *Anonymous Case No. 52 of 1869* (1). That was a case in which the accused was charged with committing house trespass by night. The case for the prosecution was, that the accused was found in the house at night. This fact the accused admitted, but he pleaded that he was there for the purpose of carrying on an intrigue with the prosecutor's wife. The Deputy Magistrate dismissed the charge under s. 250 of the Code of Criminal Procedure, on the ground that the husband refused to lay a complaint of house trespass with the intent to commit adultery, and the action of the Deputy Magistrate was approved by the High Court in these words: "The High Court are of opinion that the Deputy Magistrate, though he might have legally convicted the prisoner of the offence of house trespass, of which by his own confession he appears to have been guilty, was not bound to do so. The complainant seems to have absolutely refused to charge the defendant with having entered the house with intent to commit the offence of adultery, and founded his complaint solely on the [406] entry having been with intent to commit a theft, and that was found to be false. In the opinion of the High Court the Magistrate was right under the circumstances in refusing to convict of a charge which the husband refused to make, though the reason which the Deputy Magistrate

(1) 5 M. H. C. App. 5.

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gives, *viz.*, that he had not the power, was erroneous." Now that was a peculiar case. In the first place the learned Judges do not lay it down as a matter of law that the conviction there could not have been sustained if there had been a conviction by the Deputy Magistrate; and in the second place, the offence, with the intention of committing which the trespass in that case was found to have been committed was one which could be an offence only if the husband was not a consenting party, and would be no offence if he was a consenting party. See s. 497 of the Indian Penal Code. The refusal of the husband, therefore, to prosecute the accused for adultery in that case was a very good reason why there could not be any conviction for trespass.

In the next place, though the prosecution must prove the existence of some one or more of the intentions mentioned in s. 441 of the Indian Penal Code, the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in that section, or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and of surrounding circumstances. This is not disputed as a rule of law, but it is argued, on behalf of the petitioner, that upon the facts of this case there is nothing to prove the existence of any such intention. Now what is the evidence of conduct and of the surrounding circumstances in this case? The accused, who is a stranger to the complainant, was found at midnight stealthily entering his sleeping apartment. When detected, and subjected to very severe treatment, for the evidence goes to show that the complainant threw him down and sat upon his chest, he uttered not a word of protestation of innocence; he made not the slighest show of remonstrance, but submitted meekly to all the ill-treatment to which he was subjected, and when questioned by the complainant's mother, he simply said: "I **[407]** have committed a fault, pardon me." All this is, in our opinion, clearly proved by the evidence which we have read for ourselves. If human conduct is to be judged by the standard of human probability, it is impossible to say that the trespass could have been committed with any innocent intention, and had not been committed with a guilty intention. In our opinion, the surrounding circumstances and the conduct of the accused abundantly prove the existence of some one or other of the intentions that would bring the case within s. 441 of the Indian Penal Code.

We were told that this did not prove any intention, though it might raise a suspicion of the intention being guilty. But what is the meaning of proof as defined in the Evidence Act which is the law of the land? By s. 3 of the Act "a fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." That is the definition which the legislature has laid down for our guidance as to when a fact is said to be proved. We may add that it is only the embodiment of a sound rule of commonsense; and appyling this definition and this rule of commonsense to this case, we feel bound to say that a guilty intention is proved in this case, and that it must have been some one of those mentioned in s. 441, of the Indian Penal Code, though it is not easy to say precisely which of those it was.

A lengthy argument was addressed to us on the necessity of showing that the offence of the insult, intimidation or annoyance, to which the

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intention must relate, must be one that had been intended, and not simply one that has resulted from the trespass, and in support of this argument the cases of *In the matter of the petition of Shib Nath Banerjee*(1) *The Empress* v. *Panjab Singh* (2), *Shumbhu Nath Sarkar* v. *Ram Komul Guha* (3), and *In re Govind Prasad* (4), were relied upon. But these form very different classes of cases. They are cases where the entry appeared, or was shown to have been with some intention, other than those specified in s. **[408]** 441 and the annoyance that was caused to the person in possession of the property trespassed upon had simply resulted from the trespass without its having been intended. In the present case it is impossible to suggest that the entry had been for some other purpose, and that the insult that any one might have felt had only resulted without its having been intended. On the other hand the case of *Koilash Chandra Chakrabarty* v. *Queen-Empress* (5), relied upon by the Court below, fully supports the view we take. In that case the learned Judges observe: "What we have then to deal with is the case of a man, a stranger, who, uninvited, and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when an attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances, we think the Court ought to presume that the entry was effected with an intent, such as is provided for by s. 441 of the Indian Penal Code."

It was sought to distinguish that case from the present by showing that, whereas violence was used by the accused in that case in his effort to make his escape, in the present case no such thing has happened; but though no violence was used, we still have strong evidence furnished by the conduct of the accused, after he was caught, that his intention could not have been innocent but must have been one that was guilty. We were cautioned against drawing a wrong inference of fact from circumstances, and it was suggested to us that the accused might have entered the sleeping apartment of the complainant in a state of somnambulism, or whilst under the influence of intoxication. Of course, suggestions like these are always possible, but are they reasonable in the circumstances of the case, and can we, as reasonable men, say that, under the circumstances of this case, the entry was the result of one of these causes. We must say that the answer must emphatically be in the negative. No such thing was ever alleged or suggested in either of the Courts below, and the defence of the accused is wholly incompatible with any allegation or suggestion of this kind. We were told that, before circumstantial evidence can be made the **[409]** basis of a safe inference of guilt, it must exclude every *possible* hypothesis, except that of the guilt of the accused. We do not think that this is a correct statement of the rule.

The rule is very clearly and correctly stated in the well-known work on Circumstantial Evidence by Wills, p. 188, where it is said: "In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other *reasonable* hypothesis than that of his guilt."

We now come to the third contention of the learned Counsel for the petitioner, that this Court in revision is bound to accept the findings of fact arrived at by the Courts below, and that if those findings are not

(1) 24 W. R. Cr. 58. (2) 6 C. 579. (3) 13 C. L. R. 212.
(4) 2 A. 465. (5) 16 C. 657.

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sufficient to warrant a conviction, this Court must set aside the conviction without substituting a finding on the evidence different from that arrived at by the Court below as a basis for the same, and in support of this contention the case of *Empress* v. *Baban Khan* (1) was relied upon.

We do not think that that case supports the contention of the learned Counsel. In the exercise of our power of revision under s. 439 of the Code of Criminal Procedure, it is open to us to alter any finding and confirm a conviction; and if the evidence on the record will sufficiently warrant a conviction, we should not, in revision, be justified in setting aside the conviction, merely because the view taken of the evidence by the Courts below is one that is not sustainable, or because some fact which ought to have been found has either not been found or found incorrectly. This view is fully supported by a recent decision of this Court in the case of *Basiraddi* v. *Queen-Empress* (2).

We have given the case our best attention; we have read the evidence for ourselves; and we have carefully considered the arguments of the learned Counsel for the petitioner, and it is but due to him to add that arguments pressed by him are always entitled to careful consideration. But we must say that nothing has been shown to us to induce us to hold that the conviction in this case is wrong, either in law or upon the facts.

[410] It remains now to consider the question of sentence. The accused has been sentenced to six months' rigorous imprisonment. The learned Deputy Magistrate being of opinion that the offence is of a very grave nature; and so, no doubt, it would have been, if it could have been affirmatively found that the intention was, as he evidently thinks it was, to commit adultery; but, as we have said above, though the intention was a guilty one, it is not easy to determine which of the several guilty intentions that constitute the offence of criminal trespass, the accused had when he entered the room in question. That being so, he is entitled to the benefit of that finding to this extent that the punishment to be awarded to him should only be that which is sufficient for the offence of lurking house trespass by night with the least possible culpable intention.

Having regard to this fact, and to the condition in life of the accused, we think that a sentence of simple imprisonment for one month will fully meet the ends of justice. Accordingly we affirm the conviction and reduce the sentence to one of simple imprisonment for one month.

H. T. H. *Conviction upheld.*

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22 C. 410.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

DEVI PERSAD AND OTHERS (*Defendants*) v. GUNWANTI KOER (*Plaintiff*).* [23rd January, 1895.]

Hindu Law—Joint family—Mitakshara—Right of a widow to receive maintenance from her husband's brothers and nephew—Death of the plaintiff's husband prior to his father's death.

In a joint Hindu family governed by the Mitakshara law, the property of *S*, the father, consisted, at any rate partly, of ancestral property. He died leaving three sons and one grandson (son of a predeceased son). *A*, another son of *S*,

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* Appeal from Original Decree No. 385 of 1893, against the decree of Babu Saroda Persad Chatterjee, Subordinate Judge of Sarun, dated 20th September 1893.

(1) 2 B. 142. (2) 21 C. 827.

died childless before his father, leaving his widow, the plaintiff. In a suit by her against the brothers and the nephew of her husband for maintenance in which she claimed Rs. 100 a month : 1895 JAN. 23.

Held, that as the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's lifetime, enforced partition **[411]** of that property, and as the Hindu law provides that the surviving coparceners should maintain the widow of a deceased coparcener, the plaintiff was entitled to maintenance. APPELLATE CIVIL.

Held, also, that in determining the amount of maintenance the Court should take into consideration not only the reasonable wants of a person in her position of life, but also the means of the family of her husband. 22 C. 410.

Khetramani Dasi v. *Kashinath Das* (1); *Laljeet Singh* v. *Raj Coomar Singh* (2), *Suraj Bansi Koer* v. *Sheo Persad Singh* (3), *Janki* v. *Nand Ram* (4), *Kamini Dassee* v. *Chandra Pode Mondle* (5), *Adhibai* v. *Cursandas Nathu* (6), *Nittokissoree Dassee* v. *Jogendro Nauth Mullick* (7), and *Baisni* v. *Rup Singh* (8) referred to.

[**F.**, 23 A. 86 (88) ; 23 B. 608 (610) ; **R**, 24 B. 386 (392) ; 31 C. 473 (477) ; 22 M. 305 (307) = 1 N. L. R. 33 (38) ; **Disc.**, 31 M. 338 (342) = 18 M. L. J. 254 = 3 M.L.T. 266.]

THIS appeal arose out of an action for maintenance brought by a Hindu widow against the brothers and nephew of her deceased husband. One Sant Lal died, leaving him surviving three sons, Devi Persad, Kosilanund, Golap Chand, and a grandson by a predeceased son, Ram Lal. The plaintiff was the widow of the youngest son of Sant Lal, who died childless on the 22nd February 1870 in the lifetime of his father. The parties were admittedly members of a joint Hindu family governed by the Mitakshara law. The plaintiff's case was that after the death of her husband, she continued to live as a member of the joint family with the other members till December 1889, when the defendants separated from her and ceased giving her any maintenance, and she was obliged to go and stay with her father. She claimed maintenance, as a charge upon the family estate, at the rate of Rs. 100 per month.

The defendants resisted her claim, mainly on two grounds, *viz.*, (1) that the husband of the plaintiff having died during the lifetime of his father she was not entitled to any maintenance, and (2) that the amount claimed was excessive. The Subordinate Judge overruled the objections of the defendants, and decreed the plaintiff suit with costs. From this decision the defendants appealed to the High Court.

[412] The Advocate-General (Sir *Charles Paul*), Moulvi *Mahomed Yusoof* and Babu *Saligram Singh*, for the appellants.

Dr. *Rash Behary Ghosh* and Dr. *Ashutosh Mookerjee*, for the respondent.

The *Advocate General* contended that, if the plaintiff was entitled at all to maintenance, which was denied, the amount allowed was excessive. The amount should be fixed with reference to the reasonable wants of the plaintiff, and not with reference to the value of the estate. *Beerpertab Sahee* v. *Rajender Pertab Sahee* (9). If the value of the estate be taken into consideration, it should be the value at the time when the plaintiff's right to maintenance accrued, *i.e.*, when her husband died, and not, as the Subordinate Judge has held, when the maintenance was actually claimed.

Moulvi *Mahomed Yusoof* on the same side.—The plaintiff is not entitled to any maintenance, as her husband died during the lifetime of his father; he had only an inchoate interest in the property, and his widow had no legal claim for maintenance against her father-in-law, nor

(1) 2 B.L.R. A.C. 15 = 10 W.R. F.B. 89. (2) 12 B.L.R. 373 = 20 W.R. 337.
(3) 5 C. 148. (4) 11 A. 194. (5) 17 C. 373.
(6) 11 B. 199. (7) 5 I. A. 55. (8) 12 A. 558. (9) 12 M.I.A. 7.

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has she any such claim against her brothers-in-law. The Mitakshara nowhere lays down that a widow in the position of the plaintiff is entitled to maintenance, see Mitakshara, Chap. II, ss. 5, 10, 11, 14. *Kasheenath Doss* v. *Khetturmonee Dossee* (1), *Devi Parshad* v. *Thakur Dial* (2), and *Bhimul Doss* v *Choonee Lall* (3), were referred to.

Dr. *Rash Behary Ghose* for the respondent.—That a Hindu widow in the position of the plaintiff is entitled to separate maintenance is a well settled proposition of law: see *Adhibai* v. *Cursandas Nathu* (4), *Janki* v. *Nand Ram* (5), *Kamini Dassee* v. *Chandra Pode Mondle* (6), *Savitri Bai* v. *Luxmi Bai* (7), *Prithi Sing* v. *Raj Kooer* (8). The cases relied upon by the other side have no application.

As to the amount of maintenance to be allowed this Court [413] ought not to interfere with the order of the Court below unless very strong grounds are made out: *Collector of Madura* v. *Mutu Ramalinga Sathupatty* (9). In fixing the amount of maintenance the Court has to consider what would be the fair wants of a person in the position and rank in life of the claimant, and the wealth of the family is a proper element in determining this question. The amount ought not to be determined with reference to the consideration that the life of a Hindu widow should be of a peculiarly ascetic character: *Baisni* v. *Rup Sing* (10): Mayne's Hindu Law, 5th edition, s. 417. The question raised by the other side, *viz.*, what is the point of time at which the value of the estate ought to be taken into consideration does not really arise, as the amount of maintenance allowed is very moderate, regard being had to the wealth and circumstances of the family, even at the time when the plaintiff's husband died.

The *Advocate-General* replied.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.), was delivered by :—

JUDGMENT.

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff, respondent, to establish her right to maintenance out of the family estate of the defendants, and to recover arrears of maintenance for the last fifteen months at the rate of Rs. 100 a month, on the allegation that the defendants Nos. 1 to 3, the father of the defendant No. 4 and the late Babu Ajudhya Persad, husband of the plaintiff, were the five sons of one Babu Sant Lal, forming a joint family governed by the Mitakshara law; that after the death of her husband, the plaintiff continued to live as a member of the family in joint mess with the other members down to December 1889, when the defendants refused to maintain her, and she was obliged to go to her father's house; and that having regard to the position and means of the family, the plaintiff is entitled to Rs. 100 a month for her maintenance.

The defence was that the plaintiff was not entitled to maintenance, her husband having predeceased his father; that the defendants never refused to maintain her, and that the amount of [414] maintenance claimed was excessive. At a later stage of the case, a further defence was urged on behalf of defendant No. 4, namely, that the plaintiff was not entitled to any maintenance as she had received Rs. 10,000 for her maintenance from her father-in-law, and had ornaments to the value of Rs. 5,000.

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(1) 9 W.R. 413. (2) 1 A. 105. (3) 2 C. 379.
(4) 11 B. 199. (5) 11 A. 194. (6) 17 C. 373.
(7) 2 B. 573. (8) 12 B.L.R. 238.
(9) 1 B.L.R., P.C. 1=12 M.I.A. 397. (10) 12 A. 585.

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Upon these pleadings the following issues were framed by the Court below :—

1st.—Is the plaintiff entitled to receive maintenance from the defendants, notwithstanding that her husband predeceased his father? Did the plaintiff receive any *stridhan* from her father-in-law in lieu of her maintenance?

2nd.—Considering the position and means of the joint family, what amount of monthly allowance is the plaintiff entitled to on account of her maintenance?

3rd.—To what relief is the plaintiff entitled in the suit?

Upon these issues, the learned Subordinate Judge has held that the joint property of the family in the hands of Sant Lal consisted partly at least of ancestral property which had come down from his father; that the allegation of the plaintiff having received *stridhan* in lieu of maintenance was not true, and that the plaintiff was entitled to maintenance at the rate claimed out of the family estate upon which it was a charge; and he has accordingly given the plaintiff a decree in full.

Against that decree the defendants have preferred this appeal, and it is contended on their behalf :—

1st.—That the Court below is wrong in holding that the plaintiff is entitled to claim maintenance when her husband predeceased his father;

2nd.—That the Court below was wrong in disallowing the prayer of the defendant No. 4 for process to enforce the attendance of his witnesses;

3rd.—That the Court below is wrong in fixing the maintenance at Rs. 100 a month, which is an excessive amount.

Upon the first point, it is argued for the appellant that the plaintiff's husband having predeceased his father, Sant Lal, the plaintiff had no legal right to claim maintenance from her father-in-law [415] and in support of this contention the case of *Khetramani Dasi* v. *Kashinath Das*(1) is cited; nor can she have, it is urged, any better claim against the defendants, as they took the estate not by inheritance but by survivorship.

We do not consider this argument sound. It is unnecessary in this case to decide whether a daughter-in-law whose husband has predeceased his father and who leaves her father-in-law's house without any reason, is entitled to claim separate maintenance from him, as we find upon the evidence that the plaintiff in this case has left the family house of her late husband in consequence of ill-treatment. This being premised, we would observe that even if the plaintiff's claim for maintenance had been against the father-in-law himself, the case of *Khetramani Dasi* v. *Kashinath Das* (1) would be no answer to it. That was a case under the Bengal School of Hindu law, according to which his son has no right in his father's estate during his lifetime; whereas this is a case governed by the Mitakshara law, under which the son has a vested interest in the property of his father, inherited from his grandfather; and the property of Sant Lal was partly at least ancestral property of that description. Of such property, the plaintiff's husband could, even during his father's lifetime, have enforced partition. See Mitakshara, Chap. I, s. V, 8, 10; *Laljeet Singh* v. *Raj Coomar Singh* (2), *Suraj Bansi Koer* v. *Sheo Persad Singh* (3). Such a case must therefore involve considerations very different from those upon which the decision in the Bengal case cited for the appellants was

(1) 2 B.L.R.A.C. 15=10 W. R. F. B. 89.
(2) 12 B. L. R. 373=20 W. R. 337.
(3) 5 C. 148.

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based. Here the father could not, when the son was alive, resist the daughter-in-law's claim to maintenance, for if he refused to maintain her, the result would be that her husband would enforce partition of his share. And it does not stand to reason that the death of the son, which, on the one hand, places the daughter-in-law in a more helpless condition, while, on the other, it enlarges to some extent the father's estate, should extinguish his liability to maintain her. It is true that the father in such, [416] a case does not take anything from the son by inheritance in the strict sense of the term; but his estate and that of the other co-parceners are enlarged by survivorship, by the death of the son, who was one of the co-parceners. Accordingly Hindu law provides, as reason and justice require, that the surviving co-parceners should maintain the widow of a deceased co-parcener. This provision is to be found in some of those ancient texts which are adverse to the widow's claim to inherit (see Narada, XIII, 25, 26), and it is expressly laid down in the Viramitrodaya, one of the latest authoritative expositions of the law of the Mitakshara School. After noticing the conflicting texts relating to the widow's rights, the author of the Viramitrodaya says: "Hence the chaste wife of a sonless deceased person who was separated and not re-united is entitled to take the entire estate, but of a sonless person who was unseparated or reunited, even the chaste wife is entitled to mere subsistence by reason of texts of Narada and others, etc." See Golap Chunder Sarkar's translation, p. 153. And in another place in the same chapter, that is the one relating to the widow's succession, the author observes: "The succession, however, of the widow to the entire estate belonging to her sonless husband who was unseparated is opposed to what is declared by Katyayana, for he says, 'but when the husband dies unseparated the wife is entitled to food and raiment or (*tu*) he gets a portion of the estate till her death.' The particle *tu* bears the sense of 'or'; hence the meaning is this: Either she may directly receive food and raiment, or till her death, *i.e.*, during her life, she may get so much share of the property as is sufficient for her maintenance and for the performance of necessary religious ceremonies which a woman is competent to perform. * * * * To this very subject refers the following text of Narada: 'All chaste widows should be maintained with food and raiment by the eldest brother of the husband or by the father-in-law, or by any other gentile,' *i.e.*, whoever takes the husband's estate; maintenance is to be allowed by reason of succession to the estate." (Golap Chunder Sarkar's translation, pp. 173, 174.)

If therefore the plaintiff had claimed maintenance against her father-in-law, she would clearly have been entitled to succeed. [417] The fact of her suit being brought against her husband's brothers and nephew after the death of her father-in-law, and after the family estate had vested entirely in the defendants, only adds strength to her claim. For not only does her father-in-law's legal obligation to maintain her, arising from the fact of part of his estate being ancestral, now attach to the defendants owing to that portion of the estate having passed to them, but also what might have been merely a moral obligation on her father-in-law to maintain her has become converted into a legal obligation on the defendants by reason of his self-acquired property having passed to them. The view we take of the law relating to the daughter-in law's right to maintenance agrees with that of almost every modern jurist who has examined the subject. (See Jagannath, Digest, Bk. V., Chap. VIII, Text 412, Commentary; Strange's Hindu Law, Vol. II., 233, 235, 412; West and

Buhler's Digest, 3rd Edition, pp. 251, 761). It is in accordance with the usages and practice of the Hindu people, and it is amply supported by the authority of decided cases. [See *Janki* v. *Nand Ram* (1), *Khetramani Dasi* v. *Kashinath Das* (2), *Kamini Dassee* v. *Chandra Pode Mondle* (3), *Adhibai* v. *Cursandas Nathu* (4).

[After deciding that the second contention of the appellants, which was not material to this report, also failed, his Lordship continued.]

It remains now to consider the third contention of the appellants, that is, the one relating to the amount of maintenance.

It is argued that the amount should have been fixed with reference, not to the value of the estate, but to the reasonable wants of a Hindu widow, which, according to the injunctions of her religion, are of an extremely limited nature and very inexpensive, and that if the value of the estate in the hands of the defendants is to be taken into account at all, it must be not its present value, but that at the time of the death of the plaintiff's husband.

The first branch of this argument is so far correct, that the **[418]** amount of maintenance in cases like the present bears no definite and fixed ratio to the value of the estate ; but it cannot be said that the value of the estate is to be left out of consideration altogether, and that the amount is to be the same absolute sum in all cases, depending only on the bare cost of the necessary food and clothing of a single individual. The Hindu *shastras* no doubt enjoin on the widow a life of piety and self-denial, but still in fixing the amount of her maintenance the Court must consider what would be the reasonable wants of a person in her position in life ; and this must lead to a consideration of the means of the family of her husband. Then, again, the amount of her maintenance must be sufficient not only for her food and raiment, but also for the performance of necessary religious ceremonies, as the second of the two passages cited above from the Viramitrodaya will shew ; and these religious ceremonies must be performed by her on a scale suited to her rank and position in life, so that here again the means of the family must have to be taken into consideration. See *Nitto Kissoree Dossee* v. *Jogendro Nauth Mullick* (5), *Baisni* v. *Rup Singh* (6).

We do not think it necessary to consider at length the second branch of the above argument, as in our opinion the amount fixed by the Court would not be excessive, even if it had to be assessed with reference to the value of the estate of the family at the time of the plaintiff's husband's death. This we may add is the view taken by the Court below.

Upon the evidence we think it may be safely inferred that the estate at that date yielded an annual income of about Rs. 25,000 of which the share of the plaintiff's husband, if he had been now living, would have been one-fifth, or Rs. 5,000, and the only member of her husband's family to be supported out of it is the plaintiff herself. That being so, and having regard to all the circumstances of the case, the sum of Rs. 100 a month, the amount of maintenance fixed by the Court below, is not, in our opinion, excessive.

The grounds urged before us, therefore, all fail, and this appeal must consequently be dismissed with costs.

S.C.G. *Appeal dismissed.*

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(1) 11 A. 195. (2) 2 B.L.R. A. C. 15=10 W.R. F.B. 89.
(3) 17 C. 373. (4) 11 B. 199.
(5) 5 I. A. 55. (6) 12 A. 558.

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[419] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

LALA PRYAG LAL AND OTHERS (*Defendants*) *v.* JAI NARAYAN SINGH AND ANOTHER (*Plaintiffs*).* [8th February, 1895.]

Public Demands Recovery Act (Bengal Act VII of 1880)—Order of Revenue Commissioner setting aside sale—Review of order setting aside sale—Civil Procedure Code, s. 566—Remand—Power of High Court in second appeal.

A revenue-paying *taluk* was sold for arrears of *dak* cess under the Public Demands Recovery Act. The sale was set aside on appeal by the Revenue Commissioner, but on an application for review made to his successor, the sale was confirmed and the purchaser took possession. In a suit to recover possession of an 8-annas share of the *taluk* on the grounds, among others, that the order on review was passed without jurisdiction and without notice to the plaintiffs, and as such conferred no title on the purchaser, the District Judge, on appeal, held that the order on review not having been set aside remained in force, but he remanded the case under s. 566 for trial of the question of notice. On the case coming back to the appellate Court, before another Judge, he held the order on review to be *ultra vires*, and the trial of the question of notice to be unnecessary. The defendants preferred a second appeal against the last judgment.

Held, that on the hearing of the appeal, the entire case, including the order of remand, was open to consideration, and that the High Court had power to determine whether that order or the order subsequently passed was correct on the merits.

Held also, that the provisions of the Code of Civil Procedure relating to reviews of judgment were not extended to proceedings under Bengal Act VII of 1868 and VII of 1880, and that in the present case, the order passed on review, confirming the sale, was *ultra vires* and of no effect.

Held, further, following the ruling in *Sadhu Saran Singh* v. *Panchdeo Lal* (1) that an appeal lay to the Revenue Commissioner against the Collector's order affirming the sale.

[F., 34 C. 677=11 C.W.N. 803=6 C.L.J. 84; R., 30 C. 619 (624); 2 C.L J 306 (308).]

THE facts of this case, so far as they are material for the purpose of this report, are sufficiently stated in the judgment of the High Court.

[420] Sir *Griffith Evans*, Dr. *Trailakyanath Mitra* and Babu *Jogesh Chundra Dey*, for the appellants.

Babu *Rajendra Nath Bose* and Dr. *Ras Behari Ghose*, for the respondents.

JUDGMENT.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was delivered by

PRINSEP, J.—This is a suit brought by Darsanbati Koeri and her husband, Joy Narain Singh, to obtain possession of a revenue-paying *taluk* which had been sold under a certificate issued under Bengal Act VII of 1880 and purchased by the defendant, who, on his death, is represented by his legal representatives.

It seems that the name of Joy Narain Singh was recorded on the Collector's register, but that on the 22nd November 1884 Darsanbati obtained an order for registration of her name in the place of her husband as purchaser from him. The certificate under Act VII of 1880 bears date the 10th December 1884, but notwithstanding the order for registration of

* Appeal from Appellate Decree No. 1574 of 1893, against the decree of H. Holmwood, Esq., Officiating District Judge of Bhagulpur, dated the 28th June 1893, reversing the decree of Babu Gopal Chandra Bose, Subordinate Judge of Bhagulpore, dated the 2nd May 1892.

(1) 14 C. 1.

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Darsanbati's name proceedings were taken against Joy Narain, and not against Darsanbati. Darsanbati then applied to the Collector to set aside the sale, but her application was refused on the 4th June. She next applied for a review of that order, but this was also refused on the 24th of the same month. An appeal was made to the Commissioner, Mr. Barlow, who set aside the sale by an order of the 23rd September 1885. This was followed by an application for review of the said order by the purchaser, which came before the Commissioner, Mr. Alexander, who, on 8th June 1886, set aside the order of his predecessor, Mr. Barlow, and restored the Collector's order affirming the sale. The auction-purchaser has accordingly obtained possession, and the object of this suit is to set aside the sale and the possession acquired under it.

The Sub-Judge considered that the only point for his decision was whether the order of Mr. Alexander gave a valid title to the defendant as purchaser at the sale held by the Collector; and, finding that it was a valid order, he dismissed the suit. In appeal the District Judge, Mr. Badcock, found that only two points were raised, first, that "as the plaintiffs have never taken any steps to get Mr. Alexander's order set aside, they cannot regard it [421] as a nullity; and, second, that the order was legal, because every Judge has an inherent right to review, to correct, or reverse any error or defect." The District Judge found that Mr. Alexander's order was illegal, but he agreed with the Sub-Judge on the first point, holding that, "when an incorrect order is passed, it should be set aside in a proper way by the person prejudicially affected by it, and he is not entitled to ignore the proper procedure and, at some future time, to come forward and claim that the order should be treated as a nullity." The meaning of this is not clear; for neither the Sub-Judge nor the District Judge has stated what was the proper course for the plaintiffs to take, or why the Civil Court had no jurisdiction in the matter if the order of Mr. Alexander was passed without jurisdiction so as to make it of no effect. Probably they meant to hold that the only remedy open to the plaintiffs was to apply to the Board of Revenue for the exercise of the power of supervision and control conferred by s. 24, Bengal Act VII of 1880. But although the District Judge held that he could not touch Mr. Alexander's order for the reasons stated, he remanded the suit on the objection that Darsanbati was not properly before Mr. Alexander, because she had never received any notice of that application.

On remand, the Sub-Judge found that it was not proved that Darsanbati had received such notice. It would therefore seem that if the appeal had been tried out by Mr. Badcock, the plaintiffs would have succeeded. It seems hardly necessary to point out that Mr. Badcock's course of reasoning is unsound, for if the plaintiffs had no right to appeal to the Civil Court, because the order of the Commissioner, Mr. Alexander, could not be called into question, except by a procedure not resorted to, the Civil Court could not consider whether Mr. Alexander had properly tried the matter before him, because Darsanbati, the party concerned, had not received notice of that proceeding.

Mr. Badcock, however, had vacated office, and the appeal was tried by another District Judge, Mr. Holmwood, who apparently tried it on its merits and without regard to the findings of Mr. Badcock. Mr. Holmwood found that the order of the Commissioner, Mr. Alexander, was illegal, because he had [422] no power to review the order previously passed by his predecessor in office, the law not giving a review of judgment in such cases.

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In second appeal, it is contended that Mr. Holmwood had no power to try the appeal, except on the point on which it had been remanded by his predecessor, and that his order is bad, because it reconsidered and set aside the findings of Mr. Badcock.

But, as has been already pointed out, it would be impossible to maintain Mr. Badcock's order by following the course of reasoning taken by him. Moreover, we should not be justified on the grounds pressed on us on this second appeal to remand the case to the District Judge for trial on the issue fixed by Mr. Badcock, so as to leave it open hereafter to the plaintiff, if dissatisfied with the order so passed, to raise before us on another appeal—an appeal preferred by him—the correctness of the findings of Mr. Badcock in concurrence with the Sub-Judge on the effect of Mr. Alexander's order. It seems to us that our duty is, if possible, in this appeal to endeavour to terminate this litigation rather than, by a rigid adherence to what probably may be the letter of the law in regard to the power of the lower appellate Court, as exercised by Mr. Holmwood, to prolong these proceedings and the postponement of the ultimate decision of the real point in issue, *viz.*, the legal effect of Mr. Alexander's order.

It seems to us rather that, on the hearing of this appeal, the entire case, including the order of remand passed by Mr. Badcock, is open to consideration; and we have the power to determine whether that order or the order subsequently passed by Mr. Holmwood is correct on the merits.

There can be little doubt also that Mr. Holmwood found himself embarrassed by the form in which the appeal was presented to him, and endeavoured to deal with it in a complete manner, so as to settle the case once for all by having the entire case re-argued. He points out that, if under Mr. Badcock's view of the law, Mr. Alexander's order was illegal, all proceedings taken by Mr. Alexander were without jurisdiction, and a nullity, and he quotes authority for this. It is unnecessary to discuss how far the course taken by Mr. Holmwood was strictly correct, for we nave no doubt [423] that it is our duty to determine the point in issue, the effect of Mr. Alexander's order, on which he and Mr. Badcock have expressed different opinions.

It therefore becomes necessary for us to determine whether, as contended by the appellants, plaintiffs, the order of the Commissioner, Mr. Alexander, was *ultra vires*, as he had no authority to review his predecessor's order, and, if so, whether the purchaser has any right or title to the property in suit. But it is objected on behalf of the defendants, appellants, that, even if there be no right of review, there was no appeal to the Commissioner, and that consequently the order of the Collector affirming the sale is the only valid order, and this suit should be dismissed.

Now, as regards the right of appeal, it is sufficient to draw attention to the case of *Sadhu Saran Singh* v. *Panchdeo Lal* (1), in which it was held that the law allows an appeal against such an order of the Collector. We observe that the same point was raised in the case of *Ram Logan Ojha* v. *Bhawani Ojha* (2), but it was not decided, though it would seem from the judgment that some doubt in regard to the law expressed by the first decision was entertained by the learned Judges. After full consideration of the arguments in this appeal, we agree in the opinion expressed by Mitter, J., in the case first mentioned. We have no doubt that the

(1) 14 C. 1. (2) 14 C. 9.

first order passed by Mr. Barlow on the 23rd September 1885 is good in law. The heading of his judgment seems to indicate that it was on an appeal against the order of the Collector of Bhagulpur, not in affirming the sale, but in rejecting the review to reconsider the order affirming the sale. The object of the appellant, however, was no doubt to remove the effect of both those orders, that is, to set aside the sale and so to get herself restored as proprietor of the property which had been sold; and the body of the judgment shows that the appeal was really directed against the order affirming the sale. We attach no importance to the heading of the order, which seems to have been a misdescription, or, it may be, an imperfect description, of the matter brought before the Commissioner, which was intended to be an appeal and was so tried. There is, therefore, no valid objection [424] to our dealing with the point really in issue, that is, whether the order of Mr. Barlow was open to review.

I cannot admit that such a power is inherent in every Judicial or Revenue Officer. It is a power expressly given by law to Judicial Officers under certain conditions, and therefore it cannot be assumed that when not so given it is inherent in every officer. If this had been so, there need not have been any legislation on the subject. We cannot hold that all this legislation was unnecessary. But in respect of the matters now before us, we find that those portions of the Code of Civil Procedure which confer the power to review a judgment and regulate the exercise of such powers, have not been extended to proceedings under the Bengal Acts of 1868 and 1880; s. 19 of the Act of 1880 declares that certain portions of the Code of Civil Procedure shall be applicable to proceedings taken in regard to certificates, but we find that the portion of the Code which refers to reviews of judgment forms no part of the law set out in that section. The sections of the Code of Civil Procedure relating to appeals are also omitted, but the reason for this omission is clear. The right of appeal is conferred by Bengal Act VII of 1868, s. 2, and this, as it was held in the case of *Shadu Saran Singh* v. *Panchdeo Lal* (1), in which we concur, was held to be applicable to proceedings under the Act of 1880 by reason of s. 2 of that Act. There is no provision made for an application for review of a judgment passed on appeal by a Commissioner under the powers conferred by s. 2 of Bengal Act VII of 1868. The Acts of 1868 or 1880 are both of them silent in this respect. We find, rather, that the law has provided other means for correcting an order passed by the Commissioner on appeal, for s. 24 of the Act of 1880 has conferred on the Board of Revenue the power of general supervision and control over proceedings of Commissioners under that Act, so that any person who may be dissatisfied with an order passed by a Commissioner on appeal has thus his remedy by bringing it under consideration of the Board of Revenue. By not providing for a review of such an order, either expressly or by extending to such orders the Code of Civil Procedure relating to reviews of judgment, and by giving to a superior [425] authority, the Board of Revenue, the power to supervise and control any order passed by a Commissioner, the Legislature has, in my opinion, declared an intention that such an order shall not be open to review, but is open to revision by the Board of Revenue with the same result.

For these reasons I am of opinion that the order of Mr. Alexander affirming the sale was *ultra vires* and is of no effect, and that, under the

(1) 14 C. 1.

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order passed by Mr. Barlow on the 23rd September 1885, which declared the sale to be set aside, the purchaser has no valid title.

For these reasons the appeal is dismissed with costs.

S. C. C. *Appeal dismissed.*

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22 C. 425.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

DWARKA NATH MISSER AND OTHERS (*Judgment-debtors*) *v.* BARINDA NATH MISSER (*Decree-holder*).* [8th January, 1895.]

Partition—Decree in suit for partition—Code of Civil Procedure (Act XIV of 1882*), s.* 396*—Application for effecting partition—Limitation Act (XV of* 1877*), sch II, arts.* 178 *and* 179.

Plaintiff obtained a decree for partition in 1885, and first made an application to have the partition effected by an arbitrator in 1886. This application was struck off, and a second application was made on 23rd July 1888. The arbitrator then declined to act, and the application was struck off. The present application was made on the 1st August 1891, and an objection was raised that more than three years having elapsed from the date of the previous application, the present one was barred under art. 179 of sch. II of the Limitation Act. The lower Court of appeal held that art. 178 and not art. 179 applied to the case, but that the plaintiff having applied within three years from the date when the arbitrator declined to act, the application was in time.

Held, with reference to the provisions of s. 396 of the Code of Civil Procedure, that the proceedings for the purpose of effecting the partition were proceedings in the suit itself and not proceedings in execution of the decree; that no formal application was necessary, the Court being bound to proceed with the suit and make a final decree; and that the application made on the 1st August 1891 was not one to which limitation was applicable.

[**F.**, 17 M.L.J. 20-N; **R.**, 20 A. 311 (314) = 18 A.W.N. 99; 24 C. 725 (739) (**F.B**); 25 M. 244 (298) (**F.B.**); 28 M. 127 (129) = 14 M.L.J. 437; 7 C.W.N. 572; 18 M.L.J. 23 = 3 M.L.T. 328; 2 M.L.T. 265 (266); 47 P.R. 1906 = 86 P.L.R. 1907.]

[426] THE respondent in this appeal brought a suit against his co-sharers, the present appellants, for a partition of his share in ancestral immoveable properties and obtained a decree in the Subordinate Judges Court at Ranchi on the 10th March 1885. On appeal, the decree was affirmed with a modification only as to the extent of the plaintiff's share. An application was then made by the respondent in the form prescribed by s. 235 of the Civil Procedure Code, praying for the appointment of a certain person named therein as arbitrator to effect the partition; and the defendants, the present appellants, joined in the prayer for the appointment. The application was granted, but the arbitrator to whom the papers were sent returned them with an endorsement to the effect that the parties had not taken proper steps to enable him to partition the property. The application was struck off on the 26th August 1886. A similar application was again made on the 23rd June 1888, and the same arbitrator was again appointed, but he declined to act and returned the papers on the 12th September 1888. The application was struck off on the 26th September 1888 on the ground that process fee for issue of notices had not been deposited. The present application was made on 1st August 1891 in the same form, nominating another person as arbitrator

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* Appeal from Order No. 54 of 1894, against the order of F. Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 28th of September 1893, reversing the order of Babu Amrito Lal Pal, Subordinate Judge of Ranchi, dated the 30th of June 1893.

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for effecting the partition. But the defendants (now appellants) objected, among others, on the ground that the application was barred by limitation, as more than three years had elapsed from the date of the previous application, *viz*., 23rd June 1888.

The Subordinate Judge was of opinion that the decree of 10th March 1885 was only an "interlocutory decree," and that the applications subsequent thereto, "although filed in the form of applications for execution, were not properly applications for execution of the decree but merely so many applications by which the Court had been moved to complete the decree." He however rejected the present application as barred under art. 178 of the Limitation Act. He observed :—

"I am of opinion that it is barred. An application of such a nature comes under applications mentioned in art. 178 of sch. II of the Limitation Act, XV of 1877, and the time from which the period of limitation begins to run is, as that article prescribes, when the right to apply [427] accrues. Under the circumstances of this case I hold that the time when the right to apply accrued is the time when Iswar Babu, the arbitrator, returned the papers on the 28th July 1888, saying that the parties do not take any steps. The present application being filed more than three years after that date is barred under art. 178 of the Limitation Act."

The plaintiff appealed to the Judicial Commissioner of Chota Nagpur, and the order of that officer was as follows :—

"I think that the Subordinate Judge is right in holding that the final decree in the case not having been made, art. 178 of sch. II, Act XV of 1877 will apply (if limitation apply at all). But the date on which the papers were returned is wrongly stated by the Subordinate Judge to have been 28th July 1888. The reply of the person whom both parties had agreed to accept was given in September 1888, and the application for partition filed on the 23rd June 1888 was not disposed of till 26th September 1888.

"The application to the Court to proceed with the case on 1st August 1891 was thus made within three years of the time when Iswar Chunder Chowdhry refused to act, and proceedings by the appointment of another Commissioner became practicable. I think, therefore, the Subordinate Judge ought to have carried out the partition."

The present appeal was preferred against this order.

Babu *Golap Chandra Sarkar*, for the appellants.—Article 179 and not art. 178 applied to this case. The decree, dated 10th March 1885, was a "final decree," and the applications made thereafter were applications in execution. In *Bepin Behari Moduck* v. *Lal Mohan Chattopadhya* (1), *Bhola Nath Dass* v. *Sonomoni Dasi* (2), *and Dulhin Golap Koer* v. *Radha Dulhari Koer* (3) such decrees were held to be final for the purposes of appeal. They should also be considered final for the purpose of execution. The rulings of the Madras High Court in *Seshan* v. *Rajah Gopala* (4), and *Ramasami* v. *Anda Pillai* (5), are authorities for the proposition that applications for execution of decrees for partition may be barred by limitation. Otherwise the carrying out of the decree may be put off for any length of time. The present application was made in the usual form of application for execution. [428] Even if art. 178 applied, the right to apply accrued on the date of decree and the application was barred.

(1) 12 C. 209. (2) 12 C. 273. (3) 19 C. 463.
(4) 13 M. 236. (5) 13 M. 347 = 14 M. 252 (in review).

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Babu *Jogesh Chandra Dey*, for the respondent.—No limitation applied to the case. A recent decision of Prinsep and Ghose, JJ., in the case of *Mohadeo Ram Tewary* v. *Aroon Nath Tewary* (1), appeal from order No. 57 of 1894, was exactly in point.

[429] Babu *Karuna Sindhu Mukerji*, on the same side.—The special reason for giving an appeal against orders of this kind is given in the

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22 C. 428-N.

(1) MOHADEO RAM TEWARY *v.* AROON NATH TEWARY.

Decided by PRINSEP and GHOSE, JJ., on 4th December 1894.

Mr. *T.A. Apcar* and Babu *Jogesh Chunder Dey*, for the appellant.

Moulvi *Syed Shamsool Huda*, and Babu *Karuna Sindhu Mukerji*, for the respondent.

The judgment of the High Court was as follows :

JUDGMENT.

In this case it would appear that, on the 5th June 1869, an order having the force of a decree was passed in a suit for partition of certain properties belonging to the various parties. From that time, however, the parties themselves, as well as the Court, seem to have misconceived the nature of the proceedings which would follow in order to complete the rights of those parties, the order that was then passed not being an absolute partition, but the assigning of various properties to the several parties to represent the shares of each of those parties concerned. The proceedings subsequently taken seem to have been regarded throughout, even after the order which is now in appeal before us, as proceedings taken in execution of the decree. Section 396 of the Code of Civil Procedure was entirely overlooked. A reference to that section will show that the Code contemplates a decree to be passed after reference to the Commissioner, who shall declare the shares of each of the parties to the suit and distinguish such shares by metes and bounds if necessary. The first step was taken by the plaintiff on the 25th March 1870, and upon his application a Civil Court Amin as a Commissioner under s. 396 was deputed to make the necessary partition, and, in accordance with the order passed, he submitted a report. On this an objection was taken by three of the parties, Alam Nath Tewari and others, that certain *bhuinhari* lands should have been included in the partition. Alam Nath Tewari was described as the judgment-debtor, but he was in no sense the judgment-debtor so far as the proceedings then went. The Court thereupon directed that these lands should be included within the partition, or, in other words, that a modification of the report made by the Civil Court Amin was necessary. The parties did not, in accordance with the order passed, deposit the necessary fees for further proceedings by the Commissioner, consequently the proceedings were delayed and eventually stopped, the case having been struck off, so the terms of the order ran. The Deputy Commissioner before whom the suit had been instituted, however, passed [429] no order on the report of the Amin which was already before him, setting out by what means a complete partition could have been effected. Eventually on the 17th November 1882 the sum of Rs. 90 was paid by Alam Nath Tewari, and the Civil Court Amin was directed to make a fresh partition. The matter, however, rested there ; but in 1884 an application was made by the plaintiff for sale of the properties of Alam Nath Tewari and others to realise the amount of costs which had been awarded to him on failure of those persons to give effect to the objections taken to the report of the Amin originally made. The application at the same time asked that the final decree for a complete partition might be passed. The execution to realise the costs was disallowed, because it was held that those costs would be recoverable only upon the termination of the suit, but no order was passed on the other part of the application relating to the decree for partition. This order was passed on the 13th January 1885. The next proceeding that we find, was an application for execution of the decree filed on the 18th June 1890. Apparently nothing was done on this application, and ultimately this was renewed on the 3rd September 1891. It has been held by the Subordinate Judge, and also by the Judicial Commissioner, the Judge on appeal, that this application was barred, both Courts having regarded the proceedings taken as already stated as proceedings taken in execution of decree, and having applied to them the limitation prescribed for applications to execute decrees. We have no doubt that the view of the law on which the lower Courts have proceeded is erroneous. The proceedings taken can in no way be regarded as proceedings taken in execution of decree, but rather as proceedings in the course of the suit for partition. There has no doubt been considerable neglect by all connected with the case, the parties themselves, the Civil Court Amin, and even

judgment of Prinsep, J., in the Full Bench case (1). In the analogous cases of application for ascertainment of mesne profits a Full Bench of this Court had held (in *Paran Chand* v. *Roy Radhakishen* (2) that such applications should be regarded as continuations of the original suit, and that it was more for the Court **[430]** than for the parties to complete the decree. In the cases of *Seshan* v. *Raja Gopala* (3), and *Ramasami* v. *Anda Pillai* (4) the decrees were of a wholly different character and the question now raised was not discussed.

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Babu *Golap Chandra Sarkar*, was heard in reply.

JUDGMENT.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was delivered by

GHOSE, J.—This appeal arises out of an application made on the 1st August 1891 for the purpose of giving effect to an order which was drawn up in the form, and which has in law the effect, of a decree. The order in question was made on the 10th of March 1885 in a suit for partition. At the time when it was passed, the Court determined the rights of the respective parties, but no partition by metes and bounds was then come to. Subsequently an application was presented by both the parties to the suit on the 19th January 1886, asking the Court to appoint a certain individual as an arbitrator for the purpose of dividing the properties between them. The Court, in compliance with the prayer thus made, sent the record to the person whom the parties nominated; but it appears that, after certain steps had been taken by the parties for the purpose of partition, they made default, the result being that the arbitrator appointed returned the papers to the Court, which, on the 26th August 1886, struck off the application. Afterwards, another application was presented on the 22nd June 1888 for the same purpose, upon which the same person, who had been previously appointed arbitrator by the parties, was again appointed, but he declined to act in the matter, and accordingly sent back the record on the 12th September 1888. The proceedings were then struck off, and the present application was made, as already mentioned, on the 1st August 1891 for the purpose of having the partition of the properties, the subject-matter of the suit, effected between the parties.

The defendants objected to this application upon the ground that it was barred under the provisions of art. 179 of sch. II of the Indian Limitation Act (XV of 1877).

[431] The Court of appeal below has held that if any limitation is applicable to the case, it is art. 178 of the Limitation Act, and that the present application, having been made within three years from the time when the arbitrator appointed by the Court declined to act, is amply within time.

The present appeal is by the defendants, and the learned Vakil for the appellants has contended before us that the article of the Limitation Act which is applicable to this case is art. 179, and not art. 178, and that no proceedings having been taken by the decree-holder within three years from the date of the previous application, which was on the 22nd June 1888, the present application is barred by lapse of time.

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by the Judge before whom the suit had been commenced and in whose Court it was pending. None of the orders can be properly considered as being orders which would be binding on the parties concerned in the suit. There is nothing in our opinion to prevent the suit from proceeding so as to arrive at a final decree such as is contemplated by s. 396 of the Civil Procedure Code. We accordingly set aside the orders of both Courts, and direct that the trial of the suit do proceed.

(1) 19 C. 463. (2) 19 C. 132. (3) 13 M. 236. (4) 14 M. 252.

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On a reference, however, to the suit, and to the terms of the order that was drawn up between the parties on the 10th March 1885, we take it that the order in question was one under the provisions of the first paragraph of s. 396 of the Code of Civil Procedure, which runs as follows: "In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights." The section further provides: "The Commissioners shall ascertain and inspect the property, and shall divide the same into as many shares as may be directed by the order under which the commission issues, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares. The Commissioners shall then prepare and sign a report, or (if they cannot agree) separate reports; appointing the share of each party, and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or (where the Commissioners agree in their report) pass a decree in accordance therewith."

[432] It seems to us to be clear enough that the proceeding of the Court determining the rights of the parties is not the decree in the case, but that the decree has to be made after the Commissioner appointed by the Court actually divides the property.

In the present case what the parties applied for was a partition by metes and bounds of the property which was the subject-matter of the suit. That partition has not yet been made, and until the partition has been made, and the final decree pronounced, it could not be said that any decree in terms of the last paragraph of s. 396, has been passed in the case. The order that is made, and which was made in this case, under the first paragraph of s. 396, has no doubt the force of a decree; but the question that we have to consider is whether the proceedings that are taken subsequent to such order being passed for the purpose of effecting a partition are proceedings in the suit itself, or proceedings in execution of the decree. We think that they are proceedings in the suit itself, and not proceedings in execution of the decree.

In the case of *Paran Chand* v. *Roy Radhakishen* (1) decided by a Full Bench of this Court, a somewhat analogous question was discussed and considered. There, a decree had been passed for recovery of possession of certain immoveable property with mesne profits, the amount of which mesne profits was to be ascertained in the execution department; and the question that was referred to the Full Bench was, whether an application for ascertaining the amount of mesne profits awarded by a decree in accordance with the provisions of s. 211 or 212 of the Code of Civil Procedure is, as regards limitation, to be governed by art. 178 or by art. 179 of the Limitation Act; and it was held that neither of these articles applied to an application for ascertaining the amount of such mesne profits. The Full Bench in delivering the judgment of the Court among other matters observed as follows:—

(1) 19 C. 132.

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"The object of the Legislature in enacting s. 211 appears to have been the prevention of unnecessary litigation and multiplicity of suits, and for this purpose they empowered the Courts **[433]** to give, with the possession of the real property, such *wasilat* as they thought the plaintiff would be entitled to by law. The proceedings, therefore, determining the amount of *wasilat* are not proceedings in execution of a decree in regard to any fixed sum, but merely a continuation of the original suit and carried on in the same way as if a single suit were brought for mesne profits by itself. This has been the view accepted by this High Court in the cases of *Fazilan* v. *Keramut Hossein* (1), *Bansi Singh* v. *Nazaf Ali Beg* (2), *Dildar Hossein* v. *Majed-un-Nissa* (3) and *Anando Kishore Das Bakshi* v. *Anando Kishore Bose* (4). We must therefore take it as settled law, so far as this Court is concerned, that an order and decree in this case, referring to mesne profits, is in the nature of an interlocutory order, and that there is nothing that can be executed under s. 255 of the Code until the actual amount of mesne profits has been found and determined."

And later on the Full Bench observe as follows: "The same principle was laid down in the case of *Kylasa Goundan* v. *Ramasami Ayyar* (5) and *Vithal Janardan* v. *Vithojirav Pattajirav* (6) in which it was held that to make the provisions of art. 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief an application must be made; but there is nothing in the Code compelling a person, having the conduct of a pending suit, to make formal applications from time to time, asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound, on the oral application of the appellants' pleader—indeed without any such application at all—to fix a date for the first hearing of the inquiry; and after hearing the parties and fixing such issues as might be necessary for the disposal of the subject-matter in dispute to proceed with it as if it were dealing with a case based on a plaint."

[434] Having in view the principles which underlie the case to which we have just referred, there can be no doubt that no formal application need have been made by the plaintiff to the suit in which the order of the 10th March 1885 was passed for the purpose of effecting a partition of the property, which was the subject-matter of the suit. The Court was bound upon any application, oral or otherwise, to proceed with the suit, and to make a final decree in it after appointing a Commissioner for the purpose of effecting a partition of the property. The same view was adopted in another case decided by this Court (Prinsep and Ghose, JJ.) on the 4th December 1894 (Appeal from order No. 57 of 1894), and, following this decision, we think there can be no limitation to the application which was made by the plaintiff on the 1st August 1891.

We ought to add that the learned vakil for the appellants in the course of his argument referred to certain decisions of the Madras High Court, but it will be observed that in none of those cases was the identical question which we have to consider in this case raised or discussed.

(1) 21 W.R. 212. (2) 22 W.R. 328. (3) 4 C. 629.
(4) 14 C. 50. (5) 4 M. 172. (6) 6 B. 586.

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As regards the view thrown out by the lower appellate Court that art. 178 of the Limitation Act may be applicable, we are inclined to think that that article has very little or no application to the facts of this case.

In this view of the matter the appeal will be dismissed with costs.

S. C. C. *Appeal dismissed.*

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22 C. 434 (P.C.) = 22 I. A. 68 = 6 Sar. P.C.J. 545 = 5 M L.J. 14 = Rafique and Jackson's P. C. No. 137.

PRIVY COUNCIL.

PRESENT.

Lords Hobhouse, Shand and Davey, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

KALKA SINGH AND OTHERS (*Defendants*) *v.* PARAS RAM (*Plaintiff*). [13th November and 8th December, 1894.]

Mesne profits—Order giving mesne profits not awarded by decree—Jurisdiction—Condition in a bond unfulfilled—Abandonment of part of the amount in appeal—Reduction to below the prescribed limit of appealable amount.

An order, assumed to be made by a Court in execution, that the decree [435] holders should have mesne profits which had not been awarded in their decree, was without jurisdiction, and could not be regarded as taking effect.

This order was afterwards reversed, as having been made without jurisdiction, but was standing when the bond in suit was executed by the decree-holders, now defendants, admitting money to be due to the plaintiff, and, as to a particular sum, promising payment out of the mesne profits when realized by them. The decree-holders afterwards compromising with their judgment-debtor abandoned the claim to mesne profits. This, however, was no real concession, because the right to mesne profits had no existence.

Although the unqualified admission of a debt implies a promise to pay it, yet this implication does not necessarily follow where there is an express promise to pay in a particular manner, and on a certain event happening.

Held, on the construction of the bond, that here the admission was referable to the particular obligation agreed to be discharged only in the manner stipulated; and that, therefore, the payment was to be contingent on there being mesne profits.

Held, also, that it had not been established that the non-occurrence of the condition had been occasioned by the conduct, or default, of the defendants, and that, therefore, the objection to pay the sum in question never took effect, or became enforceable.

The defendants, having a *bona-fide* intention to appeal in respect of the whole amount decreed, obtained the certificate and admission of their appeal as competent within the Code of Civil Procedure. Afterwards, in their printed case and at the hearing, they withdrew part of their appeal, reducing, by so doing, the amount in dispute to one below the limit prescribed for appeals, where there is no special leave obtained :—*Held*, that this did not render the appeal incompetent.

[F., 6 C.W.N. 672; R., 7 A.L.J. 71 (73) = 2 Ind. Cas. 516; 15 C.L.J. 17 = 17 C.W.N. 369 (372) = 13 Ind. Cas. 440 (442); 5 Ind. Cas. 902 = 22 P.R. 1910 = 208 P. L. R. 1910 = 29 P.W.R. 1910; 8 Ind. Cas. 302 = 9 M.L.T. 17 = (1910) M.W.N. 618; 29 P. R. 1902 = 83 P. L. R. 1902; 12 O.C.275; D., 32 A. 79 (85) = 7 A.L.J. 1 = 4 Ind. Cas. 376; 19 M. 54 (56); 4 C.L.J. 510 (513, 517); 6 C.L.J. 639 (649).]

APPEAL from a decree (16th June 1890) of the Judicial Commissioner, affirming a decree (12th November 1888) of the District Judge of Sitapur.

The suit out of which this appeal arose was brought to enforce a mortgage bond for Rs. 7,000, granted by the defendants, now appellants, to Salig Ram, the father of the plaintiff, now respondent; and interest at 24 per cent. per annum was claimed from the date of the bond, 23rd August 1879, bringing the amount in suit up to Rs. 17,880. Salig Ram

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had been the defendants' pleader in suits, and had advanced money to them. In the bond they had agreed that Rs. 2,000, part of the above, should be paid by them on their realizing mesne profits in respect of land for which they had obtained a decree against one Devi Singh on the 10th October 1866.

[436] The contest in the suit was as to the effect of the agreement in the bond that the obligation as to the Rs. 2,000 should be discharged out of the mesne profits when realized. There were, in fact, no mesne profits for them to realize. None had been ordered in the decree of 1866, but the Court executing that decree had made an order, dated the 3rd April 1877, purporting to order them. This had been reversed in the Court above, and an appeal against this reversal had been dismissed by the Judicial Commissioner on the 18th February 1884. The decree-holders, afterwards, on the 22nd July 1884, entered into a compromise with Devi Singh, their judgment-debtor, and one of the terms of it was that they abandoned their claim to mesne profits, undertaking not to appeal from the order of 18th February 1884.

The principal question, then, on this appeal was whether in this suit the Judicial Commissioner had been right in his opinion that the defendants by not appealing from the order of the 18th February 1884, and by their having entered into the compromise of the 22nd July 1884 had themselves occasioned the result that there had been no possibility of realizing the mesne profits, and that they had thus precluded themselves from relying on the fact in answer to the claim for Rs. 2,000, that the mesne profits had never been obtainable. The facts on which this question of condition unfulfilled depended, had been found by both Courts in concurrence. They are set forth in their Lordships' judgment, and the only question was matter of law and construction.

The District Judge decreed for the whole amount demanded. Interest was fixed at 24 per cent. per annum on Rs. 5,000 and on Rs. 2,000 from the 22nd July 1884, which was treated as if it had been the date of realizing mesne profits.

On an appeal, the Judicial Commissioner confirmed this, except that he reduced the rate of interest payable from the institution of the suit from 12 per cent. to 6. He considered that the appellants had not done what they could to obtain the mesne profits. It was his opinion that the defendants, by their own deliberate act, prevented the happening of the event on the occurrence of which the Rs. 2,000 were to become payable [437] to the plaintiff on the bond. The latter was, therefore, entitled to treat the contract as at an end, and to sue for damages. A fair measure of damages was the principal amount and interest as claimed by the plaintiff. He maintained the decree giving the full amount of principal claimed with interest as above stated.

By order of the 7th October 1890, the Judicial Commissioner certified that the case satisfied the requirements of s. 596 of the Civil Procedure Code, and, on the 1st December 1890, an order was made admitting an appeal to the Queen in Council.

On this appeal,—

Mr. *J. D. Mayne*, for the appellants, before entering on his argument on the appeal, asked permission to confine his case to the Rs. 2,000, as he had no prospect of success with regard to the rest of the amount decreed. This appears in the appellants' printed case.

Mr. *C. W. Arathoon*, for the respondent, objected that this would bring the value of the appeal to below the amount of Rs. 10,000 the

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prescribed limit for the admission of an appeal under the Civil Procedure Code. He referred to ss. 595 and 596, and argued that this course showed the appeal to be incompetent.

Their Lordships disallowed the objection, and permitted the withdrawal, observing that there had been no objection taken at the time of the delivery of the appellants' case to the respondent.

Mr. *J.D. Mayne*, for the appellants, then argued that there was error in the judgment of the Judicial Commissioner, and the question between the parties should have heen decided on the principal facts that the event upon which the sum of Rs. 2,000 was, according to the contract of 1879, to become payable, never took place. The occurrence of the event had not peen prevented by any act, or omission, on the part of the defendants. Referring to the proceedings, it was clear that the order of the Judicial Commissioner of the 18th February 1884 was correct. On the 2nd February 1878 Kalka and Chet applied for execution, treating the order made on the 3rd April 1877, by the Court executing the decree of 1866, as a decree for mesne profits. Their application was pending for more than [438] five years, and was dismissed by the District Judge on the 10th August 1883, on the ground that there was no decree giving mesne profits. This was confirmed by the Judicial Commissioner on the 18th February 1884. These decisions were correct and in accordance with decided cases, of which *Mosoodun Lal* v. *Bekaree Singh* (1) might be cited. It was not incumbent on the decree-holders, when the Courts executing the decree of 1866 did not allow execution for mesne profits, to appeal. That would have been to attempt what would have had no probability of succeeding. Also, as to bringing a suit, the decree-holders in 1884 were out of time. Therefore, the compromise of July 1884 could not be treated as having been the cause which prevented the realization of the mesne profits, to which, in truth, the decree-holders never had any right, and they had none which they could abandon. They were in no different position, regarding the mense profits, after the compromise, from the position they had occupied before it was entered into.

Mr. *C.W. Arathoon*, for the respondent, argued that the judgment of the appellate Court below was right. Due importance should be given to the fact that both parties to the bond of 1879 had contracted in the belief that the order of the 3rd April 1877 was effective and binding and that mesne profits could be realized. Not for some years afterwards was that order reversed ; and it was submitted that the order in 1883 made by the District Judge, reversing it, was beyond his powers and irregular, supported though it was by the Judicial Commissioner in 1874. If to be reversed, it should have been reversed in due course and in due time. Passing to the view taken below that the realizing of mesne profits had been prevented by the decree-holders themselves, it was argued that the obligation upon them was to use diligence to get in the mesne profits referred to in their contract. Instead of acting in accordance with this legal duty, they omitted to appeal and had abandoned them in a compromise with the judgment-debtor. Thereupon it was the consequence that they could not insist, by way of defence in a suit for the money which they had contracted to pay, that the event contemplated had not [439] occurred. There was also the admission in the bond that the money was due. If the source, which at the time of the contract was believed to be available, for supplying the money to be paid for services rendered

(1) B. L. R. Sup. Vol. 602.

by Salig Ram, was not available, it still remained that the money was claimable; and it had been rightly decreed. For the performance of the contract it was not essential that the money should be raised in the manner indicated as the means of obtaining it; and if the particular means failed, there still remained a right to the money, and it should be decreed.

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Mr. *J. D. Mayne* was only called upon to reply as to the costs, and submitted that he should be allowed the costs of the appeal.

JUDGMENT.

Afterwards, on the 8th December, their Lordships' judgment was delivered by

LORD DAVEY.—It is not necessary to state the details of the earlier litigation out of which the present case has arisen. Suffice it to say that prior to and in the month of April 1877, Kalka Singh and Chet Singh, the present appellants, held a decree, dated the 10th October 1866, for recovery of a seven annas' share of the Baniamau Taluq, the remaining shares being held by Devi Singh and Daryao Singh in certain proportions. The decree of the 10th October 1866 did not contain any order or direction for payment of mesne profits.

The present appellants, however, made an application in their suit for payment to them of mesne profits accrued during the time they were out of possession after the decree of the 10th October 1866. On the 3rd April 1877, the Deputy Commissioner made an order in assumed execution of the decree giving the decree-holders mesne profits. This order is said to have been affirmed by the Commissioner, and it is said that the Judicial Commissioner rejected a second appeal as inadmissible.

The order of the 3rd April 1877 was not proceeded with for some reason, and on the 10th August 1883 an application to proceed upon it was dismissed by the District Judge, on the ground that there was no decree giving mesne profits to the applicants, and that decision was affirmed by the Judicial Commissioner on the 15th February 1884. *Mr. Arathoon* contended that the decision of the District Judge and Judicial Commissioner was beyond their **[440]** jurisdiction and ought to be disregarded, on the technical ground that they were bound by the order of the 3rd April 1877. Their Lordships, however, cannot take this view. It is not disputed that the Court executing the decree of the 10th October 1866 had, in fact, no power to award mesne profits not mentioned in that decree, and their Lordships agree with the Judicial Commissioner that the order of the 3rd April 1877 was no decree and was made without jurisdiction, and the application to the District Judge was, therefore, properly dismissed.

In the meantime the bonds which have given rise to the questions in the present appeal had been executed. The present suit is brought by the minor son of one Munshi Salig Ram, deceased, against the appellants, upon a bond, dated the 23rd August 1879. It will be convenient in the first instance to mention two earlier bonds. On the 1st February 1875 the appellant, Kalka Singh, gave Salig Ram a bond for Rs. 2,500, expressed to be due from Kalka Singh to Salig Ram, and on the 11th December 1877 the same appellant executed a second bond to Salig Ram, who, it should be mentioned, was a pleader and had acted for the appellants in the previous litigation. The material part of this bond is as follows:—

"Rs. 2,000, on account of pleaders' fee in the suit for mesne profits, are due from me to Salig Ram, pleader, son of Mithu Lal, caste Kayeth,

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resident of Tarimpur, and whereas a decree for mesne profits has already been passed, and the amount thereof remains to be determined after examining the accounts, therefore I do hereby declare that when the mesne profits of seven annas' share in Ilaka Baniamau are realized, I shall pay Rs. 2,000, a moiety of which is Rs. 1,000, to the said Lala Salig Ram, without any objection and without interest, as soon as any amount is realized by me, and that, if when the mesne profits are realized I do not pay the aforesaid amount, I shall pay interest thereon at the rate of 2 per cent. per mensem from the date of realization."

The operative part of the bond of the 23rd August 1879, which is now in suit, is as follows:—

"Whereas Rs. 5,500 on account of bonds, dated 1st February 1875, and 11th December 1877, are due from me to Salig Ram, son of Mithu Lal, Kanungo, resident and zemindar of Sikandarpur, District Shahjahanpur, at present residing in Narainpur District, Sitapur, and we have borrowed Rs. 1,500 in cash from the said Lala, the first condition is this that Rs. 5,000 **[441]** we shall pay without interest on the 15th of the Month of Magh, 1287 Fasli, and Rs. 2,000 we shall pay at the time of realization of mesne profits, for which a decree has already been passed in favour of us, the declarants, and in execution of which decree the property of Devi Singh and Daryao Singh, judgment-debtors, has been attached."

The sixth and ninth conditions of the bond are as follows:—

"The sixth condition is this that, if at the time of realization of the aforesaid decreed mesne profits, (we) do not pay up the sum of Rs. 2,000 to the mortgagee, interest at 2 per cent., on Rs. 2,000 shall be due from us from the date of realization of the mesne profits, and the mortgagee shall have power to realize the sum of Rs. 2,000 with interest at 2 per cent. per mensem from any of my moveable and immoveable property he please.

"The ninth condition is this that, if (we), notwithstanding the mesne profits being realized, do not pay the sum of Rs. 2,000 and interest at 2 per cent. from the date of realization of the mesne profits, the mortgaged share of the village shall not be deemed liable to redemption till the said amount with interest thereof has been paid up."

It will be observed that prior to the execution of either the bond of 1877 or that of 1879, the order of the 3rd April 1877 had been made and stood unreversed, although nothing had been done in pursuance of it.

It is stated in the record that after the order of the 15th February 1884, the present appellants applied to the Judicial Commissioner for leave to appeal to Her Majesty in Council against that order, but the application was refused. They did not apply to Her Majesty in Council for special leave to appeal. But on the 22nd July 1884 Devi Singh and the appellants signed a deed of release or compromise for settlement of the litigation between them. Thereby Devi Singh agreed to withdraw a petition he had presented for a revival of his appeal against the appellants' decree of the 10th October 1866, and to waive all further claim to the prosecution of such appeal. On the other hand, the appellants renounced all claim to mesne profits on their decree of the 10th October, 1866, and specially agreed not to prosecute any appeal to Her Majesty in Council against the Judicial Commissioner's order of the 15th February 1884. And each party gave up all claims to costs against the other.

The present suit was commenced in November 1887. By his plaint the plaintiff and present respondent sued on the bond of the **[442]** 23rd

August 1879 to recover the sum of Rs. 17,880, the whole amount claimed to be due for principal and interest, treating the bond as a subsisting continuing obligation for payment of the Rs. 2,000 and interest as well as for the larger sum. He also alleged that the defendants had withdrawn from the decree for mesne profits against the judgment-debtor by the deed of compromise. The defendants and present appellants pleaded misrepresentation, fraud and want of consideration to the whole demand. They denied that they had waived their claim against the judgment-debtor for mesne profits, and averred that there was no decree for mesne profits.

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On the 12th November 1888, the District Judge gave judgment for the respondent for the whole amount sought by the plaint, and his decree was confirmed by the Judicial Commissioner on the 16th June 1890 with a small variation as to rate of interest. The learned Commissioner held that the appellants by their own deliberate act prevented the happening of the event on the occurrence of which the Rs. 2,000 were to become payable to the respondent, and he was, therefore, entitled to put an end to the contract and sue the appellants for damages.

This is an appeal against the whole decree. A certificate was given in the presence of the parties that the value of the matter in dispute on appeal exceeded Rs. 10,000. The appellants' counsel, however, being satisfied that the appeal could not succeed as to the whole demand has by his printed case and at the bar confined his argument to the question of Rs. 2,000, and interest thereon. In these circumstances Mr. Arathoon, for the respondent, made a preliminary objection to the hearing of this appeal, on the ground that the subject-matter of it was now reduced below Rs. 10,000, and the appeal was, therefore, incompetent. Their Lordships cannot accede to this objection. On the one hand, there is no doubt that, if a certificate be granted, or leave to appeal given, by the Court below in a matter in which they have no jurisdiction, it would be the right, and, in ordinary circumstances, the duty of their Lordships to dismiss the appeal as incompetent. But, on the other hand, if an appeal is competently made, and it appears to their Lordships after argument, or is admitted at the bar, that the greater part of it must fail, it is the constant practice **[443]** of their Lordships to give relief in respect of the portion in which the appellant succeeds, notwithstanding that the subject-matter of that portion of the appeal may be less than the prescribed limit. Their Lordships see no reason to doubt the *bona fide* intention to appeal against the whole decree, and they regard this case in the same way as if Mr. Mayne had opened the whole case to their Lordships, and his client ought not to be in a worse position, because, in the exercise of his discretion, and availing himself of his experience, the learned counsel determined not to waste the public time by doing so.

On the merits of the case their Lordships cannot agree with the learned Judicial Commissioner that the appellants were under any obligation to apply to Her Majesty in Council for special leave to appeal against the order of the 18th February 1884, or that by their deliberate act in not doing so, or in executing the deed of compromise, they prevented mesne profits being recovered. The truth is there was no decree for mesne profits, and the Court could not, under the guise of execution, either add words to the decree, or give it a new and extended effect. There was no question of a fresh suit for the recovery of the mesne profits. And, indeed, it appears that such a suit would

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have been barred by the Limitation Act at the date of the deed of compromise, and could not, therefore, have been commenced with any prospect of success. It is plain when the facts are looked at that there was no real concession made by the appellants in the deed of compromise, because the right purporting to be given up had no existence. Their Lordships are, therefore, of opinion that the obligation for payment of the Rs. 2,000 and interest out of mesne profits never took effect, or became enforceable, and that it is not proved that the non-occurrence of the condition was due to the conduct or default of the appellants.

It was suggested in the course of the argument that, although the payment of the debt in the mode and form agreed upon had become impossible, the obligation to pay the debt (the existence and amount of which is admitted in the bond) remained and might be enforced against the appellants. In the first place, their Lordships observe that no such case is raised in the pleadings, or [444] apparently was argued in the Courts below, and further that their Lordships have only a translation of the instrument containing the admission. It is impossible to say that the case, if put forward in the Courts below, might not have been met by some evidence, or that the exact wording of the bond might not have been important from this point of view. In the next place, although an unqualified admission of a debt no doubt implies a promise to pay it, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case ; and their Lordships think in the present case that the admission of the debt, by which the obligation is prefaced in the bonds of 1877 and 1879, does not import an unqualified or unconditional promise to pay, but is referable to the particular obligation, or (in other words) is introduced for the purpose only of fixing the amount for which the obligation is given, and which the obligor agrees to pay in the stipulated manner and not otherwise.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the Judicial Commissioner be varied by omitting from the amount decreed to the respondent the sum of Rs. 2,000 and the interest on that sum, and the direction as to the costs of the appeal. This will not distrub the order for payment of costs in the decree of the District Judge.

With regard to the costs of the appeal to the Judicial Commissioner and of this appeal, their Lordships consider that, inasmuch as in the result the appellants have partly succeeded and partly failed, the parties should bear their own costs, and they will so advise Her Majesty.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Young, Jackson & Beard.*

22 C. 445 (P.C.) = 22 I.A. 25 = 6 Sar.P.C.J. 523 = 5 M.L.J. 1 = Rafique and Jackson's P.C. No. 136.

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[445] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Shand and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

LACHHAN KUNWAR AND OTHERS (*Plaintiffs*) v. MANORATH RAM (*Defendant*):
LACHHAN KUNWAR AND OTHERS (*Plaintiffs*) v. ANANT SINGH (*Defendant*). [20th November, 1894.]

Limitation Act (*XV of* 1877)—*Adverse possession—Hindu widow—Reversionary heirs.*

A Hindu proprieter died, leaving a widow, and also a son, who died, leaving a widow, a few years after his father, whose widow, either during the son's lifetime, or on his death, took possession of the property left by the father, and remained in possession till she died, having held it for about seventeen years. This she did notwithstanding the claim of the son's widow, whose suit against her for the property was dismissed, on the ground of limitation, in 1875. Before her death she transferred part of the property by gift, and was said to have transferred another part by will. On a question as to the capacity in which she had taken and retained possession, it was found that she had done so absolutely and without any assertion of a right, which she had not, to a widow's estate

Suits by the reversionary heirs, whom the son's widow joined, were held barred by limitation, on the ground that the possession taken had been adverse to them. Not only was any claim, through the deceased son, barred, but the rights of the reversionary heirs also, the possession by the father's widow not having been shown to be that of the limited interest of a widow.

[**R.**, 19 A. 357 = 17 A.W.N. 80; 20 A. 42; 26 B. 617 (620) = 4 Bom.L.R. 312; 26 C. 285; 20 M. 493; 24 M. 405 (408); 6 C L.J. 490 (498, 523); 9 M.L.J. 33 (34); 3 N.L.R. 35 (39); 7 O.C. 259 (264); 3 P.R. 1904 = 43 P.L.R. 1904; 41 P.R. 1903; 10 N.L.R. 35 = 23 Ind. Cas. 719; **Expl.**, 9 C.L.J. 236 = 4 Ind. Cas. 44 = 6 M.L.T. 362; **D.**, 23 A. 448; 25 A. 435 = 23 A.W.N. 93; 21 B. 646 (671); 23 C. 460 (473).]

APPEALS from decrees (21st April 1890) of the Judicial Commissioner, reversing a decree (31st December 1888) of the District Judge of Sitapur, and a decree (3rd January 1889) of the same Judge.

The first of these suits was filed on the 21st March 1888. Both were brought by the same plaintiffs, of whom the first was Lachhan Kunwar, daughter-in-law of Mangal Singh, who died in 1858, leaving a son, Pahlad Singh, husband of Lachhan. He died in 1861. Mangal Singh also left a widow, Jit Kunwar, who died on the 11th September 1887. With Lachhan were joined as plaintiffs two alleged nephews of Mangal Singh, found by the first Court to be his reversionary heirs. The first suit was brought to recover from Manorath Ram a one-sixth share, or thok, of a pattidari village, Bhamini, in the Sitapur District. This had been transferred by gift to Manorath by Jit Kunwar on the 26th **[446]** June 1886, and the plaintiff claimed on the ground that she had had no title to make the transfer.

The second suit was brought on the 6th February 1888, to recover 203 bighas of land, forming village Jogipur, with mesne profits, on the avoidance of a will put forward by the defendant, Anunt Ram, as having been executed by the same widow, Jit Kunwar, in his favour. It was agreed that the evidence recorded in the first case should be taken as evidence in the second, in which only in reference to the will should separate evidence be taken. In the result, the decision of both suits turned upon the same

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question, *viz.*, whether the law of limitation was applicable so as to bar the suit against each defendant; the Appellate Court below having dismissed both upon the ground that they were so barred. This depended on the character in which Jit Kunwar, who had taken possession after the death of her husband, had acted in so doing: whether she had asserted an absolute title in herself, or had obtained possession as widow for life only. It was also questioned, on this appeal, whether the rights of the reversionary heirs were extinguished by Jit Kunwar's possession having lasted for more than twelve years, even although it might have been adverse to the son, Pahlad, and although those who claimed through him might be barred. There was no averment, and there was no evidence, that any necessity, such as would justify a widow's alienation, had existed; and an alleged custom for a widow to alienate was disproved.

The District Judge's judgment was in favour of the second and third plaintiffs as reversionary heirs of Mangal Singh; and to the extent that Lachhan should retain possession of 103 bighas of Jogipur (the plaint setting forth that she already held that, as guzaradar, for maintenance) his judgment was in her favour also. He referred to a suit brought without success by the latter against Jit Kunwar in 1875, in which it was found as a fact, by the Commissioner, that Pahlad had never been in possession of his father's estate. He added :—

"Pahlad's mother, therefore, must have been in possession immediately on the death of her husband, as his widow; and her son having died a year after his father without obtaining possession of the estate, she continued to hold the estate in trust as the widow."

[447] For this reason, he held—

"that Jit Kunwar could not possibly have had power to alienate the estate, which she so held in trust for the heirs of Mangal Singh."

On appeals by the two defendants, the Judicial Commissioner reversed this decision. He could not concur in the finding of the District Judge that Jit Kunwar, the widow, was a trustee for her husband's heirs. He found no evidence of her having accepted that position or of a trust having been created. On the contrary, he found that Jit Kunwar, without having a title to possession, had obtained it without any. His reasons may be further expressed as follows :—

Lachhan was entitled to succeed to a widow's estate in her husband's property. She never got possession of it. Jit Kunwar, who had no title to it, took the estate, and held possession till her death, about seventeen years afterwards. In 1875 Lachhan did attempt to assert her right to possession as Pahlad's widow, but her suit was dismissed, on the ground that it was barred by limitation. It followed, therefore, that the possession of Jit Kunwar was adverse to the rightful heir, and that she, by virtue of this adverse possession, acquired by prescription an absolute title to the estate; her title, so acquired, extinguishing not merely the title of Lachhan, but also that of the reversioners expectant on the death of the latter.

The Judicial Commissioner dismissed both suits.

The plaintiffs filed these appeals.

Mr. *Herbert Cowell*, for the appellants, contended that, on the evidence, it must be taken that Mangal Singh's widow, Jit Kunwar, claimed as heir to her husband in priority over the widow of her son, who, according to the view of the District Judge, and according to that of the Commissioner in 1875, had never obtained possession. It could hardly be

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that she came in as a trespasser. After her husband's death under-proprietary rights, as against the talukdar, were granted to her; and she obtained sub-settlement rights. She managed and protected the estate, acting in all respects as if she had been holding a widow's estate. Out of that estate she paid the marriage expenses of Lachhan's daughter. Also Lachhan received from her an apportionment of land sufficient for her maintenance. Upon all these facts it was submitted [448] that Jit Kunwar had not held a possession adverse to the reversionary heirs, but that she held the limited estate of a Hindu widow, and that their right of inheritance remained, notwithstanding her attempted alienation. If the decision in 1875 established that Lachhan's claim was barred, the right of the reversionary heirs of Mangal Singh stood on a different ground. The claim preferred in 1875 was that of Pahlad's widow, brought against his father's widow, and seeking to establish a widow's estate, in her stead. If that claim was extinguished by the effect of s. 28 of Act XV of 1877, it still remained open to the reversionary heirs to contend that, on the death of the widow of Mangal, they had, for the first time, become entitled to succeed; that Jit Kunwar had not by her possession, although that had been prolonged, and of the origin stated, acquired an absolute ownership; and that she had not, as against them, acquired a title by non-claim, they not having had any claim till her death; also that her alienations were beyond her powers. Reference was made to *Board* v. *Board* (1); *Doe d. Human* v. *Pettet* (2). [LORD WATSON referred to *Lyell* v. *Kennedy*(3), observing that the facts here did not make that authority applicable.]

Mr. *J. D. Mayne*, for the respondents, was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—These appeals arise out of two suits brought by the appellants, Lachhan Kunwar and Narind Singh and Munno Singh, now deceased, the one against the respondent Anant Singh and the other against the respondent Manorath Ram. The suits were for the recovery of portions of certain property claimed to have been the ancestral property of one Mangal Singh. Mangal Singh died in 1859, leaving a widow, Mussummat Jit Kunwar, and a son, Pahlad Singh. Pahlad Singh died in 1861, leaving a widow, the appellant, Lachhan Kunwar. The other plaintiffs in the suits claim to be the reversionary heirs, both of Mangal Singh and of his son Pahlad Singh.

The case as stated in the plaints is that Jit Kunwar, the widow of Mangal Singh, as a Hindu widow, got possession of the property in dispute, as well as of other property, for her lifetime, [449] without power of alienation, and that a deed of gift and a will made by her of the property in question are void against the reversioners. It is clear upon the evidence that Jit Kunwar, if she did not get possession of the property during the life of her son, Pahlad, about which there may be some doubt, certainly got possession of it on the death of Pahlad, and remained in possession up to the time of her death, which took place in 1887.

In or before 1875 Lachhan Kunwar brought a suit against Jit Kunwar to recover possession of the property in dispute and of the other property. The result of that suit was that a decree was made by the Deputy Commissioner of Sitapur in 1875 in favour of Lachhan Kunwar. That decree was reversed by the Commissioner in the same year, and the suit was dismissed on the ground that it was barred by the law of limitation.

(1) L.R. 9 Q.B. 48. (2) 5 B. and Ald. 223. (3) L.R. 14 Ap. Ca. (H.L.) 437.

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The contention before their Lordships has been that Jit Kunwar did not take possession of the property in question, claiming an absolute title therein, but that all she did was to take possession, asserting a title as a widow; and the question in these appeals really is in what capacity she took possession. If she took possession absolutely and without any qualification, her possession would be a bar to the title of all persons who could claim as succeeding to the property on the death of Mangal. There is no direct evidence of any statement by Jit Kunwar at the time she took possession, or subsequently, that she took it as a Hindu widow, but it is sought to be inferred from various documents and statements that she must have taken it in that capacity. In the judgment of the Deputy Commissioner in 1875 Jit Kunwar's defence is referred to as stating that she pleaded by her agent that Mangal was succeeded by her to the exclusion of his son, and that she had been in sole possession of the property ever since Mangal's death in 1858 or 1859. A statement by her at that time that she took possession to the exclusion of Mangal's son cannot be reconciled with the contention now put forward that she took possession as widow. The son having the title, she could not take possession excluding him, unless she intended to take an adverse possession, a possession to which she was not in any way entitled; and that appears to have been the view of the Commissioner who dismissed that suit.

[450] The Judgment of the Judicial Commissioner now appealed from puts this point which is one of fact very clearly. He says: "It is further evident that Mussummat Jit Kunwar treated the estate always as being her own absolute property . . . . The estate she held was that of an absolute full proprietor; and not the limited estate of a Hindu widow." And again he says: "On the contrary, all the undeniable facts indicate that the position taken up by Mussummat Jit Kunwar was that she *only* was entitled to succeed to the property." Their Lordships do not find in these proceedings anything to lead them to doubt the correctness of this finding of the Judicial Commissioner; and that being the case the suit would be barred by the law of limitation, as it was held to be in the action of 1875. The contention that although it might be barred as against the son and all persons claiming under him, the effect was only to extinguish those rights, and to let in the rights of any persons who would claim as reversionary heirs of Mangal does not appear to their Lordships to be supported by authority, nor is it tenable, unless it were clearly shown that when Jit Kunwar took possession she professed to do it as claiming only the limited estate of a widow. In this case it appears very clear in their Lordships' judgment, that she did not take possession in that way. She seems to have had some reason for asserting an absolute title in herself on the death of her husband, though it does not clearly appear what that reason was.

Their Lordships, looking at what has been proved in the case, are of opinion that the decision of the Judicial Commissioner was clearly right, and that both appeals should be dismissed, and they will humbly advise Her Majesty accordingly. The appellants must pay the costs of these appeals.

Appeals dismissed.

Solicitors for the appellants: Messrs. *Walker* and *Rowe*.
Solicitor for the respondents: Mr. *W. Buttle*.

C. B.

22 C. 451.

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[451] ORIGINAL CIVIL.

Before Mr. Justice Hill.

ROGHOONATH MISSER *v.* GOBINDNARAIN. [5th January, 1895.]

Jurisdiction—Suit on Hundi—Cause of action—Endorsement by payee—Alleged agreement between payee and drawer.

A *hundi* drawn at Benares on the drawer's firm at Bombay in favour of a firm at Mirzapore and Calcutta, was endorsed at Calcutta by the payee to a firm at Calcutta and dishonoured by the drawer's firm at Bombay. In a suit brought in Calcutta by the endorsee to recover the value of the *hundi*, the defence was raised that the Court had no jurisdiction to entertain the suit.

Held, that the endorsement having taken place in Calcutta, part of the cause of action arose in Calcutta, so as to give the Court jurisdiction. *Kellie* v. *Fraser* (1) and *Doya Narain Tewary* v. *Secretary of State* (2), approved.

THE plaintiffs' firm of Roghoonath Dass Soonder Dass were in 1891 carrying on business as shroffs and merchants in Calcutta, while the defendants, under the name of Rambux Jaichand, were, besides other places, also carrying on business as shroffs and merchants in the city of Benares.

The plaintiffs alleged that on 6th November 1891 the *gomastah* of the defendants' firm at Benares drew on his own behalf upon his firm at Bombay a *hundi* in favour of a firm of Bholanath Bissessur Persaud carrying on business at Mirzapore and Calcutta. The *hundi* was for Rs. 2,500, payable sixty-five days from the date of drawing. On 9th of November 1891, the firm of Bholanath Bissessur Persaud in Calcutta endorsed the *hundi* over to the plaintiffs' firm in Calcutta, who discounted it and paid its full value.

The *hundi* was then sent by the plaintiffs to a Bombay firm, Lalla Mull Sungun Lall, for realisation from the defendants' firm at Bombay. Under instructions from Benares it was dishonoured, and on 9th January 1892, duly protested, and this suit was instituted by the plaintiffs to recover the amount. Apart from certain defences raised on the facts of the case, the defendants resisted the claim, on the ground that the High Court of Calcutta had no jurisdiction to entertain the suit, and that leave under cl. 12 of the Charter to institute the suit ought not to have been granted.

[452] Mr. *Mitter* and Mr. *Chowdhry*, for the plaintiffs.

Mr. *O'Kinealy* and Mr. *Dunne*, for the defendants.

Mr. *Dunne*, in support of the contention that the Court had no jurisdiction, cited the following cases: *Wilde* v. *Sheridan*(3); *De Souza* v. *Coles*(4); *Aris* v. *Orchard* (5); *Dhanraj* v. *Gobindaram* (6); *Buckley* v. *Hann* (7).

Mr. *Mitter contra* cited *Pragdas Thakurdas* v. *Dowlatram Nanuram* (8); *Wirth* v. *Austin* (9); *Kellie* v. *Fraser* (1).

RULING.

HILL, J.—This is an action for the recovery of Rs. 2,500, the amount of a *hundi* together with interest and protesting charges, by the endorsees against the drawers of the *hundi*.

The defendants have pleaded several matters in answer to the action, some of which relate to the performance on the plaintiffs' part of formal

(1) 2 C. 445. (2) 14 C. 456. (3) 21 L.J. Q.B. 260.
(4) 3 M. H.C. 384. (5) 6 H. and N. 160. (6) 1 B.L.R. O.C. 76.
(7) 5 Exch. 43. (8) 11 B. 257. (9) L.R. 10 C.P. 689.

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acts, such as the presentation of the *hundi* for acceptance and payment, and notice of dishonour. It was also pleaded that the plaintiffs were merely the agents of their endorsers for the purpose of collecting the amount of the *hundi*, and were bound accordingly by an arrangement between their endorsers and the defendants by which the former were precluded from recovering on the *hundi*. In addition to these pleas, it was also objected that this Court had no jurisdiction to entertain the suit.

The contention with respect to this last point, which it is necessary to dispose of before dealing with the merits of the case, was that no part of the cause of action arose within the local jurisdiction of the Court, and that, accordingly, and notwithstanding leave given under cl. 12 of the Charter, the Court has no jurisdiction over the suit. What appears is that the defendants' firm drew the *hundi* at Benares, on a branch of their firm at Bombay, in favour of a firm of Bholanath Bissessur Pershad, which carried on business at Mirzapore and Calcutta, and that the latter firm endorsed the *hundi* to the plaintiffs at Calcutta. Mr. *Dunne's* argument for the defendants was that no act, which cannot be attributed directly and immediately, that is, without the intervention of any third person, to the defendant, can enter into the cause **[453]** of action, and that, accordingly, the endorsement to the plaintiffs in the present case, which alone was relied upon to give the Court jurisdiction, formed no part of the cause of action. He contended that his proposition was supported, not only by the cases cited by the plaintiffs, but also by others which he himself cited. Since in all of them the act upon which the Court founded its jurisdiction was either in reality or in effect the act of the defendant, I cannot say I am prepared to go that length with Mr. *Dunne*. But at all events none of these cases seem to me to involve any principle, the effect of which would be to limit the scope of the cause of action in the manner contended for. Indeed the tendency of some of them, such as *Kellie* v. *Fraser* (1) and *Doya Narain Tewary* v. *The Secretary of State for India* (2), which were relied upon by the plaintiffs, and by which, I think, I ought to be guided, seems to me to be quite to the contrary. In the former of these cases, Mr. Justice Kennedy described the cause of action (in relation to the 12th clause of the Charter of this Court) as "the entire bundle of facts which would of necessity be proved." Clearly the endorsement to the plaintiffs in an action on a *hundi* by endorser against drawer is one of such facts. Again, in the latter case, Mr. Justice Mitter says: "It has been uniformly held here that the words 'the whole cause of action' in s. 12 of the Letters Patent mean *all* things necessary to give a right of action," from which it would follow that any thing necessary to give a right of action would constitute part of the cause of action. The right of action of a plaintiff suing as endorser of a *hundi* is directly dependent on the endorsement, which, accordingly, on the principle stated by Mitter, J., must form part of the cause of action. Since, therefore, the endorsement to the plaintiffs in the present case took place in Calcutta, a part of the cause of action arose here, and, leave having been given, the Court has jurisdiction.

[A decree was entered in favour of the plaintiffs for the amount claimed with interest and costs.]

Attorney for the plaintiffs: Babu *G. N. Dutt*.
Attorney for the defendants: Mr. *M. Camell*.

C. E. G.

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(1) 2 C. 445. (2) 14 C. 256.

22 C. 454.

[454] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

G. B. McINTOSH, ADMINISTRATOR TO THE ESTATE OF MR. A. R. McINTOSH, DECEASED (*Plaintiff*) v. JHARU MOLLA (*Defendant*).* [18th December, 1894.]

Land Registration Act (*Bengal Act VII of* 1876), *ss.* 42, 78—*Administrator—Obligation of Administrator to register his name before bringing suits for rent.*

A person who is an administrator, and as such the representative of a deceased proprietor of an estate and legal owner of his property, is bound to be registered under s. 42 of the Land Registration Act (Bengal Act VII of 1876) before he can sue the tenants of the estate for rent.

THIS and two other appeals heard at the same time arose out of suits for rent which were brought by the administrator of the estate of A. R. McIntosh, deceased, who was proprietor of the estate in which the lands of the tenant defendants were situated. Several issues were raised, the only one material to this report being the first issue: Can the plaintiff sue the defendants for rent without getting his name registered under the Land Registration Act (Bengal Act VII of 1876)?

The Munsif found this issue in favour of the plaintiff, and from this decision the defendants appealed.

The judgment of the lower appellate Court on the point in dispute was as follows:—

"The point raised in these appeals involves a difficult question, which, as far as can be ascertained, has never yet been decided by any authority. The suits are for rent, and have been brought by one G. B. McIntosh as administrator to the estate of A. R. McIntosh, the registered proprietor. It is contended by the learned pleader on behalf of the appellant that, on a proper construction of Bengal Act VII of 1876, the present suits will not lie, inasmuch as the plaintiffs' name has not been registered under the provisions of that Act. Section 38 of the Act is to the effect that the proprietor or manager of an estate must register his name showing the character and extent of his interest as proprietor or manager within a certain period. Section 42 runs as follows: 'Every person succeeding after the commencement [455] of this Act to any proprietary right in any estate or revenue-free property, whether by purchase, inheritance, gift, or otherwise, every joint proprietor of an estate or revenue-free property assuming charge, after such commencement, of such estate or property, or of any interest therein, respectively, on behalf of the other proprietors thereof, and every person assuming charge, after such commencement, of any estate or revenue-free property, or of any interest therein respectively, as manager, shall, within six months from the date of such succession or assumption of charge, make application in the manner hereinafter provided to the Collector of the District on the general register of which such estate or property is borne, or to any other officer who may have been empowered by such Collector to receive such application, for registration of his name and of the character and extent of his interest as such proprietor or manager.' Under s. 78 it is provided 'that no person is

*Appeal from Appellate Decree No. 108 of 1894, against the decree of T. D. Beighton, Esq., District Judge of 24 Pergunnahs, dated the 5th of October 1893, reversing the decree of Babu Jagat Narain Sircar, Munsif of Baruipur, dated the 17th of March 1893.

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bound to pay rent to a person claiming as proprietor or manager unless the name of such claimant shall have been registered under the Act.'

"I find from an examination of the letters of administration granted to Mr. G. B. McIntosh, and from the will of the late Mr. A. R. McIntosh, that the latter constituted his widow as his executrix, and that the letters of administration were granted to the present plaintiff as the substituted attorney of H. M. McIntosh, and 'limited until the said H. M. McIntosh shall obtain from this court the probate of the will.' The question turns upn the construction of s. 42. The nature of the succession which carries with it the obligation of registration under the Act is defined in the first clause of that section, and it is contended by the learned pleader for the respondent, that as the words 'executor' and 'administrator' do not occur, and no words of similar meaning are to be found, the usual rule as to the interpretation of statutes would not allow of a presumption that the Legislature intended to include the succession of an administrator. The rule referred to is that in interpreting an Act of the Legislature general words are controlled and restricted by particular words. In my opinion this canon of interpretation does not arise here. Had the section run, 'whether by purchase, inheritance, gift or the like,' it might have been argued that the words 'or the like' referred to succession *ejusdem generis*. The words, however, are 'or otherwise.' I believe, therefore, that the Legislature intended the enactment to be completely exhaustive and to include every form of devolution of property. The object of the Act is to ensure as great publicity as possible to any change in the proprietorship. It will be noted that under s. 49 of the Act an elaborate system of publication has been enacted to ensure that all persons concerned may become aware of the mutation; and I can see no reason why a transfer of proprietary right created by a will should be exempt from the operation of an Act which is intended to operate as a safeguard to tenants who have rents to pay. It may further be suggested that the word 'gift' in s. 42 might **[456]** possibly include devolution of property by will, which is in fact a gift becoming operative after the death of the testator.

"I do not think it necessary to decide, for the purposes of these appeals, whether the person whose name should be registered is the substituted attorney of the executrix or the executrix herself, but without the registration of one or the other of these individuals I consider that the suits cannot be brought, and the appeals must, therefore, be decreed with costs."

The plaintiff appealed from this decision to the High Court, on the ground that the Judge was wrong in holding that the suit could not be brought without the registration of the name of the plaintiff, or that of the executrix of the will of A. R. McIntosh, under Bengal Act VII of 1876; that the words "whether by purchase, inheritance, gift or otherwise" were not intended to be exhaustive; that administrators and executors were not included in ss. 38, 43 and 78 of the said Act; and that the interpretation of the Act by the Judge was wrong in law and ought not to be upheld.

Mr. *Henderson*, Mr. *McNair* and Babu *Upendra Gopal Mitter*, for the appellant.

Babu *Sreenath Das* and Babu *Promotho Nath Sen*, for the respondent.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

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The question raised in this second appeal is, whether a person, who is an administrator, and as such the representative of the deceased and the legal owner of his property, is bound to be registered under s. 42 of the Land Registration Act. Looking at the nature of the Act, and the purposes for which it was enacted, namely, to prevent people from realizing rent without being registered, we think that an administrator is bound to be registered under s. 42, and that this appeal must, therefore, be dismissed with costs.

J. V. W. *Appeal dismissed.*

22 C. 457.

[457] CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Beverley.

HARI MANDLE (*Complainant*) v. JAFAR (*Accused*).*
[14th February, 1895.]

Penal Code (Act XLV of 1860), s. 429—"*Bull*" *and* "*Cow*," *Definitions of*—"*Any other animal*," *Meaning of.*

The words "bull" and "cow" in s. 429 of the Penal Code include the young of those animals. The section specifies the more valuable of the domestic animals, without any regard to age, but in respect of other kinds of animals not so specified, the section would not apply unless the particular animal in question was shown to be of the value of fifty rupees or upwards.

THIS case having been reported to the High Court with reference to another matter, an order was made on the 4th of December 1894, calling upon the accused to show cause why the order of the Officiating Sessions Judge should not be set aside.

The facts of the case are fully given in the judgment.

No one appeared to show cause.

The judgment of the Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

BEVERLEY, J.—In April last three persons were detected in the act of butchering and skinning a calf. One of them, a boy named Doman, was arrested at the time; the other two, Shaik Jafar and Shaik Narain, escaped, and were not arrested till some time afterwards. Doman was convicted on the 26th April by the Deputy Magistrate of Contai of an offence under s. 429 of the Indian Penal Code, and was sentenced to undergo six weeks' rigorous imprisonment. Upon appeal the Sessions Judge, Mr. Pratt, upheld the conviction, but in consideration of the youth of the appellant and the fact that he appeared to be a tool in the hands of the other two men, reduced the sentence to three weeks' rigorous imprisonment. On the 4th July, Jafar and Narain were tried in respect of the same occurrence by the same Deputy Magistrate at Contai, and they were convicted by him of the offence of theft under s. 379 of the Indian Penal Code, [458] and were sentenced to suffer rigorous imprisonment for one year. Upon appeal the Officiating Sessions Judge, Mr. Kedar Nath Roy, held that the finding under s. 379 could not stand, inasmuch as it was not shown

* Criminal Miscellaneous Case No. 54 of 1894, against the order passed by Babu Kadar Nath Roy, Officiating Sessions Judge of Midnapore, modifying the order of the Deputy Magistrate of Contai, dated 4th July 1894.

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that the calf had been moved out of the possession of the complainant. He held, however, that the offence of mischief had been committed, but that such offence would not fall under s. 429 of the Indian Penal Code, but under s. 426 of that Code, and he accordingly reduced the sentence to three months' rigorous imprisonment, the maximum punishment provided by that section. In his judgment he remarks as follows: "The subject of slaughter was admittedly a calf of the value of eight rupees. The complainant said so in his first information and deposition. All the witnesses describe it as a calf. It has been held, and it is now widely known to all Magistrates, that a calf. which is valued under fifty rupees, does not come within the provisions of s. 429 of the Indian Penal Code."

The case having been reported to this Court with reference to another matter, an order was made on the 4th December last, calling upon the accused to show cause why the order of the appellate Court should not be set aside, and the sentence passed by the Deputy Magistrate restored. The rule has been served upon Shaik Jafar, but Shaik Narain is reported to have died. No cause has been shown before us.

We are of opinion that the decision of the Officiating Sessions Judge is erroneous. We think that the words "bull" and "cow" in s. 429 include the young of those animals, and that the expression "any other animal" in that section does not mean an animal of the kind already mentioned, but refers to an animal of a different *genus* altogether such as a dog or a goat. It is stated in Mayne's Commentary of the Indian Penal Code that, at the fourth Madras Sessions of 1864, Scotland, C.J., held that a calf does not come within the terms "bull, cow, or ox." So far as we are aware, that decision is not reported, and we are not prepared to follow it. It seems to us that the section specifies the more valuable of the domestic animals without any regard to age, but in respect of other kinds of animals not so specified the section would not apply, unless the particular animal in question was shown to be of the value of fifty rupees or upwards.

[459] Accordingly, setting aside the order of the Officiating Sessions Judge, we alter the finding of the Deputy Magistrate in this case to a conviction under s. 429 of the Indian Penal Code, and we restore the sentence of one year's rigorous imprisonment which he imposed. Shaik Jafar must accordingly be re-arrested and undergo the unexpired portion of the sentence.*

S. C. B.

* The same point was similarly decided in the case of *Jaga Bundhoo Mythee* v. *Golam Ali Sha* (Criminal Miscellaneous Case No. 53 of 1894), which was heard by the same Judges (NORRIS and BEVERLEY, JJ.) on the same day.—*Rep. note.*

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22 C. 459.

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APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

CHANDIDAT JHA (*Defendant*) v. PADMANAND SINGH BAHADUR AND OTHERS (*Plaintiffs*).* [24th January, 1895.]

Civil Procedure Code (*Act XIV of* 1882). ss. 492 *and* 503—*Receiver, Appointment of—Temporary Injunction.*

The distinction between a case in which a temporary injunction may be granted, and a case in which a receiver may be appointed, is that, while in either case, it must be shown that the property should be preserved from waste or alienation; in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *prima facie* title has to be made out.

Sidheswari Dabi v. *Abhoyeswari Dabi* (1) approved.

An order of the lower Court for appointment of a receiver under s. 503 of the Civil Procedure Code (Act XIV of 1882) was set aside, and an order for a temporary injunction, under s. 492 of the Code, granted.

[R., 27 C. 279 (281) = 5 C.W.N. 362; 4 Bur.L.T. 241 = 12 Ind. Cas. 198; 14 C.L.J. 215 = 14 C.W.N. 248 = 5 Ind. Cas. 96; 1 C.W.N. 170 (172); 11 Ind. Cas. 870 = 21 M.L.J. 821 = 10 M.L.T. 490 = (1911) 2 M.W.N. 75; 2 L.B.R. 89 (91); 2 L.B.R. 222; 5 O.C. 65 (68, (B); U.B.R. (1908), 2nd Qr., C.P.C., p. 17.]

APPEAL from orders passed by the Subordinate Judge of Bhagalpore, on an application for an injunction and appointment of a receiver under ss. 492 and 503 of the Civil Procedure Code (Act XIV of 1882).

[460] Rajah Lilanand Singh Bahadur, of the Boneli Raj family, which is governed by the Hindu Law of the Mithila School, died on the 3rd June 1883, leaving him surviving two sons, Rajah Padmanand Singh (plaintiff No. 1) by his second wife Rani Parbati, and Kumar Kalanand Singh (plaintiff No. 2) by his fourth wife Rani Sitabati, and one daughter, Kamikhya Dai, by his third wife Rani Chandeswari. Kumar Kirtan and Singh (plaintiff No. 3), his third son by Rani Sitabati, was born after his death, on the 23rd September, 1883.

Rani Chandeswari died on the 17th June 1875, and all her properties, moveable and immoveable, devolved on her daughter, Kamikhya Dai, who also acquired various other properties after her mother's death. Kamikhya was given in marriage to the defendant Chandidat Jha, a Brahmin of the Suti class, and the only issue of that marriage was a son named Anantanand Jha. Kamikhya Dai dying on the 16th September 1892, her husband (the defendant) took possession of her properties on behalf of Anantanand, then an infant. Anantanand died on the 15th April 1893.

On the 11th July 1893, the plaintiffs brought the suit, now pending in the Court of the Subordinate Judge at Bhagalpore, in connection with which the present application for injunction and receiver was made. They asked for possession of the properties left by Kamikya Dai and Anantanand Jha by declaration of their title, chiefly on the ground of a family custom thus described in the plaint.

5. "That from time immemorial it has been, and still is, the custom in the family of the plaintiffs to make provisions for the decoration and support of the female members of the family by assigning over to

* Appeal from Order No. 305 of 1893, against the orders of Babu Madhub Chander Chackravarti, Subordinate Judge of Bhagalpore, dated the 31st July, the 12th August, and the 5th of September 1893.

(1) 15 C. 818.

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them ornaments and other moveable properties and allowances in cash, or, in lieu thereof, immoveable property, to be used, held, and enjoyed by them for life, and in case they should have lineal descendants, to be used, held, and enjoyed by such lineal descendants. But the female members of the family, or their lineal descendants, have no power to alienate that property, either temporarily or permanently. On the death of such female members without lineal descendants, or in case of their leaving lineal descendants and such lineal descendants becoming extinct, all those ornaments and other moveable and immoveable properties and all other property, moveable and immoveable, which may have been acquired by such female members, or other lineal [461] descendants, with the aid or out of the income of the said property, revert to the said family, and thenceforward become part and parcel of the said Raj and Riasat."

6. "That it has from time immemorial been, and it still is, the custom of the said family, which is considered to be not equal in rank to the Suti class of Brahmins, to give the daughters of the family in marriage to men belonging to the Suti class of Brahmins, and these men, on such marriages, become degraded to what is called the Bikawa class, for which marriages these men of the Suti class demand and receive large sums of money on the occasion of the marriages; and it has also from time immemorial been, and still is, the custom of the said family, as well as of the Bikawa class of Brahmins, for such Brahmins not to be entitled by any right whatever either of inheritance or otherwise to any property, moveable or immoveable, assigned to their wives for their decoration and maintenance as aforesaid."

* * * * *

The circumstances under which the plaintiffs made their application for an order of injunction and appointment of receiver were also given in the plaint.

15. "That the defendant endeavoured to remove from the said house at Sultanganj portions of the property mentioned in the last preceding paragraph, that is, para. 14, and upon complaint made by the plaintiffs, the District Magistrate of Bhagalpore, on the 29th April 1893, issued an injunction, under the provisions of s. 144 of the Criminal Procedure Code, restraining the defendant from doing so; but in spite of such injunction, the defendant clandestinely removed some of the said jewels and ornaments and gold mohurs to an out-house and buried the same in the ground; but, subsequently, on a search made by the District Superintendent of Police of Purnea, the same were, on the 8th June 1893, found by him, and put into the same house, and the defendant had, prior to the issue of the said injunction, removed some gold and silver articles and kept them with Babu Kunjlal, Mahajan, inhabitant of Nya Bazar in the town of Bhagalpore."

On the same day (11th July 1893), a separate petition, praying for orders for injunction and appointment of a receiver, was presented on behalf of the plaintiffs, and affidavits were filed in support of the petition. The lower Court granted an *interim* injunction and issued a rule on the defendant to show cause against the plaintiffs' application for the appointment of receiver. The defendant filed a petition, denying the material allegations made by the plaintiffs, and setting out his own title, and he filed several affidavits in support of his petition.

[462] The Subordinate Judge ordered that the prayer for the appointment of a receiver of the immoveable property be rejected, but the

application as regards the disputed moveable property (with certain exceptions mentioned in the order) was granted.

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The defendant appealed to the High Court.

The Advocate-General (Sir *Charles Paul*), Babu *Dwarka Nath Chakrabarti* and Babu *Digambar Chatterjee*, for the appellant.

Sir *Griffith Evans*, Babu *Taraknath Palit* and Moulvie *Mahomed Yusuf*, for the respondent.

The Advocate-General (Sir *Charles Paul*), for the appellant.—The plaintiffs have not made out any case for an order for a receiver or injunction. The suit on the face of it has no reasonable ground of success. The claim on the ground of family custom is untenable. The Boneli Raj is not an impartible Raj, and the family is new; there can be no valid custom in such a family. The custom as alleged is also unreasonable and void as affecting the right of alienation. As to the affidavits, the Raja (plaintiff No. 1) himself does not make any affidavit. A clear and strong case must be made out to justify an order for a receiver and injunction. *Sidheswari Dabi* v. *Abhoyeswari Dabi* (1), *Owen* v. *Homan* (2), *Clayton* v. *The Attorney-General* (3), and *North London Railway Company* v. *Great Northern Railway Company* (4) were referred to.

Sir *Griffith Evans.*—The affidavits sufficiently make out a case for the appointment of a receiver and for an order of injunction. Kerr on Injunctions, 3rd Edn., pp. 11 and 12; *Moran* v. *River Steam Navigation Campany* (5); *Walker* v. *Jones* (6); Seton on Judgments and Orders, Vol. I, 5th Edn., p. 651.

The *Advocate-General* was heard in reply.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This is an appeal against an order for the appointment of a receiver pending the result of a suit.

[463] The suit was instituted by Rajah Padmanand Singh and others, sons of the late Rajah Lilanand Singh Bahadur, for recovery of possession of various properties, moveable and immoveable, which the defendant is in possession of, and which he claims by right of heirship to his son, Anantanand Jha, deceased. The plaintiffs' claim is founded mainly upon an alleged custom, both in the family of the plaintiffs and among Maithil and Suti Brahmins generally, that custom being that, when a provision is made for the support and adornment of a female member of the family, by grant of properties, she holds such properties for her life; that they devolve upon her death upon her lineal descendants; but that, on failure of lineal descendants, the properties revert to the family of the grantor. And it is stated that this custom obtains also in the case of a girl belonging to a family of the Maithil class of Brahmins being married into the Suti class, which is higher in rank than the Maithil class; and that, in case of such marriage, the husband becomes degraded to the Bikawa class, and does not inherit the properties given to the girl by the family of her father.

It would appear from the plaint that the late Rajah Lilanand Singh gave various properties to his wife Rani Chandeswari, the step-mother of the plaintiffs; that these properties devolved upon her death upon her

(1) 15 C. 818.
(2) 4 H.L.C. 997 (1032).
(3) Cooper's cases in Chancery, Vol. I, 97.
(4) L.R. 11 Q.B.D. 30.
(5) 14 B.L.R. 352.
(6) L.R. 1 P. C. 50.

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daughter, Kamikhya Dai; that from the profit of those properties Kamikhya acquired other properties, and that she obtained certain other properties, by grant from the plaintiffs' family; and that all these properties, upon her death, went to her son Anantanand Jha; and upon his death, which occurred recently (April 1893), they came into the possession of the defendant.

The plaintiffs in their plaint base their claim mainly upon the custom which has already been referred to, and also upon an alleged adoption in the *kritima* form of Rajah Padmanand Singh by Rani Chandeswari; but this latter ground does not seem to have been much relied upon in the matter of the application for the appointment of a receiver.

The defendant denied the custom alleged by the plaintiff and the right asserted by him.

The application that was made by the plaintiffs in the Court below was for the appointment of a receiver under s. 503 **[464]** of the Code of Civil Procedure, as also for an order of injunction under s. 492, and in support of such application certain affidavits were put in on behalf of the plaintiffs, and there were counter-affidavits on the part of the defendant denying most of the statements made in the affidavits produced by the plaintiffs.

The Subordinate Judge was of opinion that no sufficient case for the appointment of a receiver in respect of the immoveable properties was made out, but that such a case was established in regard to the moveable properties (with the exception of certain properties mentioned in his order), and he made an order accordingly.

In dealing with the question raised before him, the Subordinate Judge seems to have been of opinion that the plaintiffs were entitled to have a receiver appointed, if it appears that the plaintiffs had a fair question to raise, and if there was strong ground of apprehension that the property in dispute would be lost or wasted if not placed in the hands of a receiver. And in this view of the matter, he thought that the affidavits on behalf of the plaintiff justified the appointment of a receiver.

It seems to us that in thus dealing with the matter, the Subordinate Judge has fallen into an error. He would, no doubt, have been right if he had made an order for an injunction (see Kerr on Injunctions, pp. 11-12).

In the case of *Sidheswari Dabi* v. *Abhoyeswari Dabi* (1) the law on the subject of the appointment of a receiver was thus laid down by a Divisional Bench of this Court: "Both the Deputy Commissioner and the Judge seem to think that it is sufficient to justify the appointment of a receiver if the allegations of the plaintiff show a sufficient cause of action, and if the management of the estate has been and is such as to render the appointment expedient. Section 503 of the Civil Procedure Code certainly gives a wide discretion to the Court. It empowers the Court to appoint a receiver whenever it appears to be necessary for the realization, preservation, or better custody or management of any property the subject of a suit. This power is not, however, greater than that exercised by the Courts in England; and **[465]** it must, we think, be exercised on the same principle, that is to say, with a sound discretion, on a view of the whole circumstances of the case, not merely circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which

(1) 15 C. 818.

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is asserted and has to be established. If a right was asserted to property in the possession of the defendant claiming to hold under a legal title, the Courts did not interfere, by appointing a receiver unless a very strong case was made out. The principles to which we refer are stated in Kerr on Receivers, 2nd Edn., p. 3, by Lord Cranworth in *Owen* v. *Homan* (1) and in *Clayton* v. *The Attorney-General* (2). We see no ground for the contention that these principles were not applicable in this country. They are adopted to prevent a wrong to the defendant which might equally be done here if they were not followed. It was indeed conceded that the plaintiff must at least show that her claim is honest and well founded, and if she must show that much, it is a mere question of degree as to how far she must make out her case." This view seems to be fully borne out by the authorities quoted ; and we may say that we entirely concur in it.

The Subordinate Judge does not appear to have kept in view the distinction which exists between the case of an injunction and that of a receiver. That distinction seems to be that, while in either case it must be shown that the property should be preserved from waste or alienation ; in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged ; while in the latter case, a good *prima facie* title has to be made out (see Kerr on Receivers, pp. 3-4 ; Kerr on Injunctions, pp. 10-11).

Addressing ourselves then to the merits of the application, we observe that the plaintiff, Rajah Padmanand Singh, who is best able to depose to the existence of the alleged custom and the adoption set up by him, has not given his own oath ; and the affidavits that have been produced are not of a satisfactory character.

[466] The defendant claims to hold the property on a legal title; and if the property did belong to his son, Anantanand Jha, he would be entitled to it, unless the custom alleged by the plaintiff is clearly established. We are not called upon, nor do we think we should be justified, to express any opinion upon this question ; but confining ourselves to the materials now before us, we are not prepared to say that the plaintiff has made out a good *prima facie* case such as to justify the Court in ordering that the properties should be taken away from the possession of the defendant and placed in the hands of a receiver.

But, then arises the question whether, in the circumstances which have transpired at the trial of the question before the Subordinate Judge, the moveable properties, which are mostly jewels and gold and silver articles, should not be preserved and prevented from waste, as provided by s. 492 of the Code.

It appears from the affidavits and other documents which were placed before the Subordinate Judge that some portion of the valuable jewellery and gold mohurs were removed from the defendant's house at Sultanganj and found buried in an out-house, and that some of the gold ornaments were taken away by the defendant and placed in the custody of a banker, Kunj Behary, at Bhagalpore. The defendant alleges that the first-mentioned act was an act of one of his servants in conspiracy with the plaintiffs, and that the deposit of the jewels with Kunj Behary was in accordance with an old practice. This may or may not be so ; but these circumstances are suspicious, and lend support to the allegation of the

(1) 4 H. L. C. 997 (1032). (2) Cooper's cases in Chancery, Vol. I, p. 97.

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plaintiffs that there is danger of the moveable properties being wasted or alienated, and the Subordinate Judge has so found.

We think that, in the circumstances of this case, we ought to make an order under s. 492 for the purpose of reserving the moveable properties from being wasted and alienated.

We understand that the whole of these properties is now in the custody of the Collector. If so, there will be no difficulty in making a full and correct inventory of these properties. Such inventory should be made by a responsible officer of the Court in the presence of both the parties, or their authorized agents; and **[467]** the respective prices of the properties should be ascertained and entered in the inventory. After such inventory has been made, the properties will be made over to the defendant, but he will be restrained by an injunction from wasting, alienating, or otherwise dealing with them until the result of the suit now pending in the lower Court. Among the moveable properties, there is a mortgage-bond, dated the 19th March 1885, executed by Rajah Lilanand Singh in favour of Kamikhya Dai, and certain Government Promissory notes. With regard to these properties, we direct that while the defendant will be prohibited from alienating or otherwise dealing with them, he may be permitted to sue upon the mortgage-bond and take steps to realize the amount covered thereby, but the money when realized will be kept in Court until the disposal of the suit. And as regards the Promissory notes, he may draw the interest as it falls due from time to time.

The order of the Court below, appointing a receiver to take charge of the moveable properties, will be set aside, and, in lieu thereof, there will be an order under s. 492 in the terms already expressed. Each party will bear his own costs in both the Courts.

S. C. C. *Appeal allowed.*

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22 C. 467.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

NAM NARAIN SINGH (*Decree-holder*) *v.* LALA ROGHUNATH SAHAI, MINOR, THROUH HIS MOTHER AND GUARDIAN BHIKAM KOERI (*Judgment-debtor*).* [12th February, 1895.]

Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act, I of 1879), s. 88—Decree for rent and cancelment of lease, execution of—Appellate decree, effect of.

A decree under s. 88 of the Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879) provided that on failure of the defendant (tenant) to pay the amount due under the decree within fifteen days, his lease should be cancelled. An appeal preferred against this decree was dismissed, and the defendant paid the decretal amount within fifteen days of the date of the appellate decree. Some time after, the decree-holder applied for execution of the decree and cancelment of the lease. The applioation was rejected by the Court below.

[468] *Held*, that in a case where the decree of the original Court was not executed pending the appeal to the higher Court, the words "date of the decree" in the latter part of s. 88 of Act I of 1879 ought to be read as the date of the *final* decree; that the decree of the appellate Court was the final decree and the only decree capable of execution; and the payment of the decretal amount having been made within fifteen days of that decree, the application for execution was rightly disallowed.

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* Appeal from Order No. 86 of 1894, against the order of Babu Basanta Kumar Bose, Deputy Collector of Hazaribagh, dated the 4th of January 1894.

Noor Ali Chowdhuri v. *Koni Meah* (1), *Daulat* v. *Bhukandas Manekchand* (2), *Rupchand* v. *Shams-ul-Jehan* (3) followed. **1895 FEB. 12.**

[R., 21 M.L.J. 1020=10 M.L.T. 281=(1911) 2 M.W.N. 239 ; 48 P.R. 1906 (F.B.)=104 P.L.R. 1906; 19 C.L.J. 193=18 C.W.N. 814=20 Ind. Cas. 499 (500) ; D., 17 C. L.J. 120 (122)=17 C.W.N. 457=18 Ind. Cas. 747.] **APPELLATE CIVIL.**

22 C. 467.

IN a suit brought by the appellant (landlord) under the provisions of s. 88 of the Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879), a decree was passed in his favour on the 22nd July 1892 on the following terms:—

"That a decree be passed for the sum of Rs. 4,973-15, besides the costs of the Court. Should the defendant fail to pay the amount of decree within fifteen days, the *mokurari pattah* shall be cancelled."

An appeal was preferred to the High Court by the tenant (respondent), and the decree of that Court, dated 21st June, 1893, was as follows:—

"It is ordered and decreed that the appeal be and is hereby dismissed." . . . . . .

On the 6th July 1893, a petition was presented to the Court of first instance, on behalf of the tenant, stating that the entire decretal amount had been paid to the manager of the decree-holder, and the manager as well as the pleader of the decree-holder put their signatures on the petition.

On the 1st August 1893, the decree-holder made an application to execute the decree, praying for the recovery of the decretal amount and also for the cancelment of the *mokurari* lease. The application was rejected by the lower Court on the ground, among others, that the payment referred to in the petition of the 6th of July, mentioned above, was made within time.

The decree-holder appealed to the High Court.

Mr. *Phillips* and Babu *Karuna Sindhu Mukerjee*, for the appellant.

[469] Dr. *Rash Behari Ghose* and Babu *Jogesh Chandra Dey*, for the respondent.

Mr. *Phillips* contended that the fifteen days' time granted by the decree should be calculated from the date of the original decree. Admitting that the decree of the High Court was the decree in the case, there was nothing in that decree to excuse the defendant from making payment according to the original decree. The effect of the appeal decree is that the original decree stood as it was. The case of *Noor Ali Chowdhuri* v. *Koni Meah* (1), relied on by the Court below, was a case under Bengal Act VIII of 1869. It referred to the cases of *Luchmun Persad Singh* v. *Kishun Persad Singh* (4) and *Kisto Kinker Ghose Roy* v. *Burrodacaunt Singh Roy* (5), which deal with the question whether the appeal decree is the decree to be executed. There is no dispute as to that. But the decision is not correct in holding that the deposit was made in time. What the Court has to see is, what was the decree in the case and whether the appellate decree gave the defendant a fresh start. *Aminabi* v. *Sidu* (6) is a case in point. There is nothing in the appeal decree to give the defendant a fresh start, and the incorporation of the original decree in the appeal decree had no such effect. At the end of fifteen days from the original decree the plaintiff became entitled to possession ; how did he lose that right? It cannot be said that the effect of the appeal was to make the decree contingent on the decision of the appeal ; for stay of execution would then be the necessary consequence of an appeal. [Dr. *Rash Behari Ghose* referred to the case

(1) 13 C. 13. (2) 11 B. 172. (3) 11 A. 346. (4) 8 C. 218.
(5) 10 B.L.R. 101=14 M.I.A. 465. (6) 17 B. 547.

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of *Daulat* v. *Bhukandas Manekchand*(1).] The decision in that case went on the practice followed in mortgage cases. The analogy of mortgage cases does not apply to the justice of this case. Here justice is in favour of the appellant's contention. The contention of the defendant, if allowed, would lead to vexatious appeals. [Dr. *Rash Behari Ghose* referred to the case of *Rupchand* v. *Shams-ul Jehan* (2).] That was a pre-emption case ,and it is no doubt against the appellant's contention. But the **[470]** cases of *Jaikishen* v. *Bholanath* (3), *Manavikraman* v. *Unniappan* (4), *Chudasama Manabhai Madarsang* v. *Iswargur Budhagar* (5) are in my favour.

Dr. *Rash Behari Ghose* and Babu *Jogesh Chandra Dey*, for the respondent were not called upon.

JUDGMENT.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was delivered by

GHOSE, J.—This appeal arises out of an application for cancellation of a *mokurari pattah*, under which the defendant holds, in terms of a decree passed by the Deputy Collector of Hazaribagh on the 22nd of July 1892. The decree runs as follows: "That a decree be passed for the sum of Rs. 4,973-15 as., besides the costs of the Court. Should the defendants fail to pay the amount of decree within fifteen days the *mokurari pattah* shall be cancelled. In case the decretal amount be not paid within fifteen days, interest shall be charged at the rate of Rs. 6 per cent. per annum." This decree was made according to the provisions of s. 88 of Bengal Act I of 1879, which is as follows. "Any person desiring to eject a rayat, or to cancel a lease on account of non-payment of arrears of rent, may sue for such ejectment or cancelment and for recovery of the arrear in the same action, or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrears in a suit for such ejectment or cancelment. In all cases of suits for the ejectment of a rayat, or the cancelment of a lease, the decree shall specify the amount of the arrear: and if such amount, together with interest, and costs of the suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed."

The decree of the Deputy Collector of Hazaribagh was appealed to the High Court; and this Court, on the 21st of June 1893, dismissed the appeal, confirming thereby the decree of the Court of first instance, with costs. It would appear that pending the appeal to this Court, the decree-holder did not take out execution of the decree of the Court of first instance; and the **[471]** decree of this Court having been pronounced on the 21st June 1893, the defendant, within fifteen days from that date, paid into the hands of the decree-holder's pleader the amount covered by the decree. Notwithstanding this, on the 1st August 1893, the decree-holder presented a petition for the purpose of giving effect to the decree of the Court of first instance and for ejectment of the defendant from the property covered by the *mokurari pattah*, upon the ground that that decree had not been complied with, because, within fifteen days from the date thereof, the judgment-debtor did not deposit in Court the amount covered thereby. The lower Court has disallowed this application following the decision of this Court in the case of *Noor Ali Chowdhuri* v. *Koni Meah* (6), in which it was laid down, with reference to the provisions of s. 52 of Bengal Act VIII of 1869, which contained words almost similar to those that are to

(1) 11 B. 172. (2) 11 A. 346. (3) 14 A. 529.
(4) 15 M. 170. (5) 16 B. 243, (248). (6) 13 C. 13.

be found in s. 88 of Bengal Act I of 1879, that the decree of the appellate Court is the only decree of which execution could be taken out, and that that decree must be presumed to have incorporated the terms of the original decree, and that if the arrears were paid within fifteen days from the date of the decree of the appellate Court, the tenant was not liable to be ejected.

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On appeal to this Court, on behalf of the decree-holder, it has been contended by the learned Counsel that the principle laid down in the case relied upon by the lower Court is not correct, and that in determining the question whether the decree that was pronounced in the suit has been complied with by the defendant, we must look at the decree of the Court of first instance, and of that Court only, and not to the decree of the appellate Court, because that decree was but in affirmance of, and not of reversal or modification of, the decree of the Court of first instance; and it was contended that the defendant, not having paid in the amount of rent decreed in the suit within fifteen days from the date when the Court of first instance made its decree, we ought to hold that the decree-holder is entitled to obtain the relief which he asked for, namely, ejectment of the defendant. We are, however, unable to accept this contention as correct. It has been held in various cases, both in this Court and **[472]** in the Privy Council, that, when a decree of the Court of first instance is appealed from to a higher Court, the decree of that Court, whether it be one of affirmance or reversal of the decree of the Court of first instance, should be taken to be the final decree in the case, and the only decree which is capable of execution. A Divisional Bench of this Court in the case of *Noor Ali Chowdhuri* v. *Koni Meah* (1) in following this principle have held that although the decree of the appellate Court did not in so many words specify that the defendant should have fifteen days' time from the date of its decree, still it must be presumed to have incorporated the terms of the original decree; and in the language of Mr. Justice West in the case of *Daulat* v. *Bhukandas Manekchand* (2) it must be supposed as if "it drew up the decree of the lower Court and gave its existence, as if made on the day upon which it was thus adopted." We find that the principle laid down in the case of *Noor Ali Chowdhuri* v. *Koni Meah* (1) has been adopted in the case of *Daulat* v. *Bhukandas Manekchand* (2) to which I have just referred, and in the case of *Rupchand* v. *Shams-ul-Jehan* (3). We think we may well follow this principle and the cases which have given effect to it; and we think that, having regard to what has already been laid down in other cases, namely, that the decree of the appellate Court should be taken to be the final decree and the only decree capable of execution, we ought in a case, where the decree of the original Court was not executed pending the appeal to the higher Court, to read the latter part of s. 88 thus: "and if such amount, together with interest and costs of the suit, be paid into Court within fifteen days from the date of the *final* decree, execution shall be stayed." Reading the section in this wise, we think we would be giving effect to the true intention of the law; and in this view of the matter, we hold that the Court below was right in disallowing the application of the decree-holder. The learned Counsel did not raise before us any other point; and the point that he discussed before us being given against him, the result is that this appeal is dismissed with costs.

S. C. C. *Appeal dismissed.*

(1) 13 C. 13. (2) 11 B. 172. (3) 11 A. 346.

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APPEL-
LATE
CIVIL.

22 C. 473.

22 C. 473.

[473] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

RAMRANJAN CHUCKERBUTTY (*Defendant No.* 1) *v.* NANDA LAL LAIK AND OTHERS (*Plaintiffs*).* [4th February, 1895.]

Sonthal Pergunnahs Settlement Regulation (III of 1872), ss. 11, 25—"*Proprietor,*" *Meaning of—Suit for establishment of lakhiraj title and amendment of record of rights—Jurisdiction of Civil Court—Onus probandi.*

In proceedings for settlement of rent and record of rights under the Sonthal Pergunnahs Settlement Regulation (III of 1872), certain lands claimed by the plaintiffs as *lakhiraj* were ordered to be recorded as *mal* and assessed with rent, the Commissioner of the Division stating that the plaintiffs might, if they chose, bring a suit in the Civil Court. The defendant (zemindar) obtained an *ex-parte* decree for rent on the basis of the *jummabandi* prepared in the said proceedings. In a suit brought to establish the plaintiffs' *lakhiraj* title and for an order directing the record of rights and *jummabandi* to be amended.

Held, that a *lakhirajdar* is a "proprietor" within the meaning of s. 25 of the Regulation, and ss. 11 and 25 did not bar the jurisdiction of the Civil Court in this case.

Ram Charan Singh v. *Dhaturi Singh* (1) distinguished.

Held, also that in the present case the onus was on the plaintiffs to prove their alleged *lakhiraj* title.

[**R.**, 37 B. 409=19 Ind. Cas. 874 (876)=15 Bom.L.R. 357 ; **D.**, 19 C.L.J. 232.]

THE facts necessary for this report and the arguments of the pleaders are sufficiently stated in the judgment of the High Court.

Babu *Mohini Mohun Roy*, Babu *Karuna Sindhu Mukerjee*, and Babu *Joy Gopal Ghose*, for the appellant.

Babu *Sreenath Dass* and Babu *Nalini Ranjan Chatterjee*, for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This suit arises out of proceedings taken for the record of rights under the provisions of Reg. III of 1872 (Sonthal Pergunnahs Settlement). A contest then arose between **[474]** the plaintiff on the one hand, and the defendant, who is the zemindar, on the other hand, whether certain lands held by the former were his *lakhiraj* or rent-paying *mal* lands of the zemindar. There were various proceedings in connection with the determination of this matter, and ultimately it was ordered that they should be recorded as *mal*, and assessed with rent, the Commissioner of the Division at the same time (26th January 1889) stating that the plaintiffs might, if they chose, bring a suit in the Civil Court.

Subsequently, a suit for rent was brought by the zemindar against the plaintiff, upon the basis of the *jummabandi* prepared by the settlement officer, and an *ex-parte* decree was obtained.

The present suit is by the plaintiff to have it declared that the lands are his *lakhiraj*, and also to recover possession of some of these lands, the allegation of the plaintiff being that, subsequently to the order of the

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* Appeal from Appellate Decree No. 1423 of 1893, against the decree of R. Carstairs, Esq., Deputy Commissioner of Donka in Sonthal Pergunnahs, dated the 20th of April 1893, modifying the decree of F. E. Piffard, Esq., Sub-Divisional Officer of Jamtara, dated the 26th January 1893.

(1) 18 C. 146.

Commissioner, dated the 26th January 1889, the defendant dispossessed him therefrom.

The main defence of the zemindar is that the lands are not *lakhiraj*, but rent-paying *mal*.

The Court of first instance distinctly found that the various *sunnuds* and other documents produced by the plaintiff were genuine, and that they established the *lakhiraj* title set up by him; and accordingly decreed the suit.

On appeal by the defendant, the Deputy Commissioner has affirmed the decree of the Court of first instance.

On second appeal to this Court, two contentions have been raised before us by the learned vakil on behalf of the zemindar: the *first* is, that, having regard to the provisions of ss. 11 and 25 of Reg. III of 1872, no suit would lie in the Civil Court to contest the correctness of the decision arrived at, and the record of rights made, by the settlement officer; and *second*, that, in determining the case, the lower appellate Court has erroneously thrown the onus of proof upon the zemindar, whereas it ought to have been upon the plaintiff, to prove that the lands claimed were his valid *lakhiraj*.

[475] As regards the first point, it has been contended that it is only when a question of right arises as between two "zemindars," or between two "proprietors," that a suit would lie in the ordinary Civil Court to contest the order of the Settlement Officer, and that the plaintiff, the so-called *lakhirajdar*, is not a proprietor within the meaning of s. 25 of the Regulation; and the case of *Ram Churn Singh* v. *Dhaturi Singh* (1) has been quoted in support of this contention.

We are, however, unable to give to the word "proprietor" that restricted meaning which the learned vakil for the appellant would give to it. The plaintiff claims under a title hostile to the zemindar: he says that the lands are his valid *lakhiraj*, and that he has held the same as *lakhiraj* for more than twelve years adversely to the zemindar, and that he has thereby acquired a good title therein. If this title be made out, it would be that of an absolute owner of the property, and in this sense the plaintiff would be as much a proprietor as the defendant himself is. As regards the case cited, we think it has no application to this case. There the question was between the zemindar and another person who claimed to be a *mokuraridar* under him; and the Settlement Officer recorded the lands as *mokurari*. The zemindar thereupon sued to recover possession of the lands, upon the ground that the defendant had no such interest as was claimed. And it was held, as we understand the decision, that the question raised was not between two "proprietors" within the meaning of s. 25 of the Regulation. That is not the case here.

As regards the other contention, we think that the appellant is right. The Settlement Officer found that the lands were rent-paying *mal*; and a decree for rent was subsequently obtained by the defendant upon the basis of the *jammabandi* which that officer had prepared. In these circumstances, when the plaintiff seeks to contest the decision of the Settlement Officer, and to have it declared that the lands are his *lakhiraj*, the onus is, in the first place, on him to prove that they are so. The learned Judge of the Court below, however, has proceeded in determining this case upon the view that the burden of proof is upon **[476]** the defendant zemindar. In this, we think, he has fallen into an error.

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(1) 18 C. 146.

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In this connection our attention has been called to a passage in the judgment of the Judge where he makes the following observations: "As regards the rest of the land, with the exception of the tanks, it appears that the land is admittedly in possession of the plaintiffs, and has been sufficiently identified. He has thus established *prima facie* claim to the land as *lakhiraj*, and the burden of proof is thrown on the respondent."

It has been contended for the respondent that the Judge has here found, putting the onus upon the plaintiff, that he has proved that the lands are *lakhiraj*, or at any rate, that he has established a *prima-facie* case so as to shift the burden of proof on the zemindar. But we are unable to accept this contention as correct. The mere fact of the lands being in the possession of the plaintiff, and of their having been sufficiently identified, would not entitle him to the declaration he asks for, nor would it make out a *prima facie* case of the lands being *lakhiraj*. It has, however, been argued that the Judge has here found that the lands are the same as are covered by the various *sunnuds* and other documents produced by the plaintiff. It is not clear to our minds whether that is what the judgment meant to find. Moreover, we observe that the defendant raised the question whether the *sunnuds* were true and whether the grantors of those documents had authority to grant them. Therefore, without dealing with these questions, it is not enough to say that the lands have been identified, supposing that the judgment meant to find that they have been identified with those that are covered by the said documents.

In these circumstances, we think it right to remand the case for retrial. The learned Judge will, after putting the onus of proof in the first place upon the plaintiffs, find whether the lands are valid *lakhiraj*, and whether they have been held as *lakhiraj* for more than twelve years adversely to the zemindar so as to confer upon him a title by prescription.

Costs to abide the result.

S. C. C. *Case remanded.*

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22 C. 477.

[477] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

ANAND LAL PARIA AND OTHERS (*some of the Defendants*) *v.* SHIB CHUNDER MUKERJEE AND ANOTHER (*Plaintiffs*).* [4th March, 1895.]

Second appeal—Bengal Tenancy Act (*VIII of* 1885), *chap. X, ss.* 106, 108—*Record of rights—Dispute prior to the preparation of—Standard of measurement. question of.*

In a proceeding under chap. X of the Bengal Tenancy Act, a dispute arose between the parties, before the preparation of the record of rights, on the question of the local standard of measurement. The Settlement Officer decided the case in favour of the plaintiffs, and, on appeal to the Special Judge, the decision was upheld.

Held, that the order of the Settlement Officer was not one under s. 106 of the Bengal Tenancy Act, and under cl. (3) of s. 108, no second appeal lay to the High Court.

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* Appeal from Appellate Decree No. 1471 of 1893, against the decree of J. Pratt, Esq., Special Judge of Midnapore, dated the 17th of April 1893, affirming the decree of Babu Sotish Chunder Bose, Settlement Officer of Midnapore, dated the 14th of December 1892.

Gopinath Masant v. *Adoita Naik* (1) referred to.

[Overruled, 24 C. 462 (F.B); R., 28 C, 471 (474).]

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APPELLATE CIVIL.

22 C. 477.

THIS appeal arose out of proceedings under chap. X of the Bengal Tenancy Act. Measurements having been commenced under the provisions of that chapter, petitions were made by the tenants, on the 4th May 1892, stating that the local standard of measurement was a cubit of 20 inches. On the 1st June a notice was issued by the Settlement Officer in the following terms :—

"Under an order of this day, all people who have concern with the said mouzas are informed by this notice that they should themselves, or through their authorized representatives, produce in this office at Midnapore at 7 A.M. of the 15th June next, which is fixed, objections, if they have any, in respect of the area of a bigha as stated above (80 cubits long by 80 cubits broad, a cubit being equal to 20 inches). Otherwise the said quantity shall be held as the area of a bigha as prevalent in all those mouzas after the expiration of the said date, on the assumption that no objection has been raised and that no objection shall be heard afterwards."

[478] The landlords in their petition, dated 14th June 1892, represented that the length of the standard cubit was 18 inches only. Evidence was adduced by both parties and the case was decided by the Settlement officer in favour of the landlords (plaintiffs). The defendants appealed to the Special Judge. The appeal was dismissed.

The defendants preferred a second appeal to the High Court.

Babu *Umakali Mukerjee*, for the appellants.

Babu *Bhowani Churn Dutt*, for the respondents.

Babu *Bhowani Churn Dutt* raised a preliminary objection to the appeal and contended, on the authority of *Gopinath Masant* v. *Adoita Naik* (1), that the decision appealed from not being in a case under s. 106 the Bengal Tenancy Act, no second appeal lay to the High Court under s. 108, cl. (3).

Babu *Umakali Mukerjee* argued that this case was decided under s. 106, and a second appeal did lie from the Special Judge's order. There was no other section in chap. X of the Bengal Tenancy Act, providing for the hearing of a case like this, and as s. 108, cl. (2), authorized an appeal to the Special Judge only in cases provided for in chap. X, the decision of the Special Judge would be *ultra vires* if the case did not come under s. 106. Plaintiffs did not object to the appeal before the Special Judge, and should not be allowed to raise the objection now taken. Moreover the order of the Settlement Officer *proposed* to make an entry, and the same dispute is substantially raised as in the case of an entry *made* in the record. The case cited in support of the objection did not intend to lay down any general proposition, and the circumstances of that case were different.

Babu *Bhowani Churn Dutt*, was heard in reply.

The following judgments were delivered by the Court (GHOSE and RAMPINI, JJ.) :—

JUDGMENTS.

RAMPINI, J.—This is an appeal against an order of the Special Judge of Midnapore, affirming an order of a Settlement Officer made in the course

(1) 21 C. 776.

1895 MARCH 4. — APPELLATE CIVIL. — 22 C. 477.

of a settlement under chap. X of the Bengal Tenancy Act. The plaintiffs and the defendants disputed as to the length of the rod to be used in the measurement. The [479] plaintiffs contended that it should be a rod of 18 inches, while the defendants said it should be one of 20 inches. Both the lower Courts have found in favour of the plaintiffs, and the defendants appeal to this Court.

A preliminary objection has been raised that no second appeal lies to this Court, and I think this objection must prevail. It is evident that a second appeal only lies to this Court from an order passed under s. 106 (not being an entry of a rent settled), and the decision of the Settlement Officer in this case was not such a decision for the sufficient reason that no record of rights has yet been prepared or published, and, therefore, there can have been no dispute and no decision of a dispute regarding the correctness of an entry in it. This has already been held in the case of *Gopi Nath Masant* v. *Adoita Naik* (1), in which it has been pointed out that, while under s. 108, cl. (2), an appeal lies to the Special Judge from any decision of a revenue officer "under this chapter" (*i.e.*, chap. X), it is under sub-s. (3) only in the case of the decision being one under s. 106, and being one of a dispute with regard to an entry other than an entry of rent settled, that a second appeal lies to the High Court.

Against this it has been urged (1) that the decision of the Settlement Officer must be one under s. 106, because there is no other section of chap. X under which it can come; and (2) that, if it does not do so, it cannot come under any section of chap. X at all, and then the Special Judge can have had no jurisdiction to hear an appeal from the Settlement Officer's decision in the case.

But neither of these reasons seems to me to have any weight; whether or not the Settlement Officer's decision can be referred to any section of chap. X other than s. 106, it does not follow, I think, that for that reason, it must have been one under s. 106. It may not have been one under chap. X at all; whether this be so or not, I am not called upon in this case to decide. It is sufficient, in my opinion, to hold that, for the reason already stated, it is not one under s. 106.

Then it is also surely unnecessary for us to come to any [480] conclusion whether an appeal lay to the Special Judge or not. This point is not before us for decision. Anything we could say on this point would be an *obiter dictum*. It is sufficient for us to hold, as I think, on the authority of the ruling above referred to, and the provisions of s. 108, cl. (3), must be held, that in this case no second appeal lies to this Court.

I would, therefore, reject this appeal with costs.

GHOSE, J.—I concur with my learned colleague in holding that no second appeal lies to this Court against the decision of the Special Judge at this stage of the proceedings. Reading ss. 105 to 108 together, it would seem that it is only after an entry has been made, and a draft of the record prepared by the revenue officer has been published, and the objection, if any, that may be made to an entry (not being an entry of a rent settled under chap. X), has been decided under s. 106, that a second appeal lies to the High Court under the provisions of cl. 3 of s. 108.

S.C.C. *Appeal dismissed.*

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(1) 21 C. 776.

22 C 480.

APPELLATE CIVIL.

1895 JAN. 28. — APPELLATE CIVIL. — 22 C. 480.

Before Mr. Justice Ghose and Mr. Justice Rampini.

JAGA SINGH (*Plaintiff*) *v.* CHOOA SINGH (*Defendant*).*
[28th January, 1895.]

Bengal Tenancy Act (*VIII of* 1885), *ss.* 69, 70, *cl.* 5—*Deposit of crops by order of Collector—Suit against depositaries—Privity—Cause of action.*

In the course of proceedings held under ss. 69 and 70 of the Bengal Tenancy Act (VIII of 1885), the landlord's (ticcadar's) share of the produce was deposited by the Amin by order of the Collector, with two persons. The depositaries executed and delivered a receipt to the Amin. Some time after, the ticcadar made an application to the Collector in order to obtain his share of the produce ; but on a representation being made by one of the depositaries that the crops (with the exception of a small portion) had been destroyed by rain, the Collector declined to grant any relief to the ticcadar. The ticcadar then brought this suit against the depositaries for recovery of the value of the crops deposited. *Held* that the receipt executed and delivered to the [481] Amin established privity between the plaintiff and the defendant so as to enable the former to maintain the suit. *Held*, also, that the suit was maintainable in the Civil Court. Sections 69 and 70 of the Bengal Tenancy Act refer to and contemplate proceedings between the landlord and the tenant. When a plaintiff seeks relief, not against his tenant, but against a third party, a depositary or bailee, the suit is not barred by anything contained in those sections.

[Cited, 32 C. 422 (424).]

THE facts of this case are sufficiently set out in the judgment of the High Court.

Babu *Umakali Mukerjee*, for the appellant.

Moulvie *Mahomed Yusuf*, for the respondent.

JUDGMENT.

The judgment of the High Court (GHOSE and RAMPINI, JJ.) was delivered by

GHOSE, J.—This suit arises out of proceedings taken by the landlord under the provisions of ss. 69 and 70 of the Bengal Tenancy Act for the appraisement and division of certain crops raised by a certain tenant. It appears that under the orders of the Collector an Amin was deputed for this purpose ; and, on the 6th January 1887, the Amin reported that he had made a division of the crops, but that the landlord would not take his share thereof. Upon that, on the 11th January 1887, the Collector ordered the crops to be deposited with two independent persons, and accordingly the Amin deposited them with the defendants, Choowa Singh and Jhummon Singh, who became depositaries of the plaintiff's share of the crops under a receipt which they executed and delivered to the Amin. That receipt runs thus : " We herewith take in deposit 427 maunds 39½ seers of paddy, which is the share of Jaga Singh, ticcadar of Mahabatpore, and agree that we shall deliver up the paddy as soon as we are called upon to do so." In the month of July 1890, an application was made to the Collector by the plaintiff for obtaining his share of the produce, and, in the course of the proceedings that were then taken by the Collector upon this application, Jhummon Singh appeared and stated by an application that

* Appeal from Appellate Decree No. 1981 of 1893, against the decree of H. Holmwood, Esq., Officiating District Judge of Bhagalpur, dated the 14th of August 1893, reversing the decree of Babu Shoshi Bhushan Chowdhry, Munsif of Monghyr, dated the 25th of February 1893.

1895 JAN. 28. — APPELLATE CIVIL. — 22 C. 480.

the whole of the crops, with the exception of 40 maunds, had been damaged or destroyed by rain. Thereupon, the Collector, on the 10th February 1891, recorded an order, simply saying that he could not help the plaintiff. The present suit was brought on the 10th August 1891 to recover [482] from both Chooa Singh and Jhummon Singh the value of the crops which were deposited with them.

The Court of first instance gave a partial decree to the plaintiff against both the defendants. Against this decree, Jhummon Singh did not appeal, but Chooa Singh, the other defendant, did; and, upon his appeal, the learned District Judge has dismissed the suit so far as he is concerned. The grounds upon which the judgment of the District Judge proceeds, as far as we can gather are two: *First*, that having regard to the provisions of s. 70, cl. 5 of the Bengal Tenancy Act, this suit is not maintainable in the Civil Court; and, *secondly*, that there is no privity as between the plaintiff and the defendants, and the plaintiff has no cause of action against them.

It will be observed that ss. 69 and 70 refer to and contemplate proceedings between the landlord and the tenant. They have no reference whatsoever to a third party like the present defendants, who, in the course of those proceedings, became depositaries or bailees. Clause 5 of s. 70, to which the Judge refers, runs as follows: "The Collector may, if he thinks fit, refer any question in dispute between the parties for the decision of a Civil Court, but, subject as aforesaid, his order shall be final, and shall, on application to a Civil Court, by the landlord or the tenant, be enforceable as a decree." Reading ss. 69 and 70 together, we think there can be no doubt, as I have already observed, that they refer to proceedings between the landlord and the tenant: and this is emphasized by the last portion of cl. 5. In this view of the matter, we think that when a plaintiff seeks relief in the Civil Court, not against his tenant, but against a third party, a depositary or bailee, it is not barred by anything contained in ss. 69 and 70 of the Bengal Tenancy Act.

As to the second ground made against the plaintiff by the learned Judge, it seems to us that the receipt of the 19th January 1887, to which reference has already been made, does establish privity between the plaintiff and the defendants. No doubt, the order that is referred to in the last portion of the receipt is an order to be made by the Collector; but this order, it is obvious, is an order to be made in the interest of the plaintiff. That being so and the defendants having received charge of the crops as belonging [483] to the plaintiff, they are bound to make them over to him. They became depositaries or bailees, and as such they were bound to take that care which a prudent owner would ordinarily take of similar property belonging to himself. If it appears upon the evidence that they did take such care with the crops belonging to the plaintiff, and that they were damaged or destroyed by reason of circumstances over which they (defendants) had no control, no doubt the plaintiff would not be entitled to recover any damages as against them. But if, on the other hand, it does appear upon the evidence that they failed to take such care, and by reason of their negligence the crops were damaged or destroyed, then we think the plaintiff would be entitled to recover as against them compensation for the loss sustained by him. We think, therefore, that the judgment of the learned District Judge cannot stand. The case will accordingly be remanded to the lower appellate Court for retrial. The costs will abide the result.

S. C. C. *Case remanded.*

22 C. 483.

1895 JAN. 30.

APPELLATE CIVIL.

22 C. 483.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

BIRU MAHATA (*Defendant*) *v.* SHYAMA CHURN KHAWAS AND OTHERS (*Plaintiffs*).* [30th January, 1895.]

Civil Procedure Code—(Act XIV of 1882*), s.* 244*—Suit for property wrongly taken in execution of decree—Right of suit—Jurisdiction—Procedure.*

Under s. 244 of the Civil Procedure Code (Act XIV of 1882) no separate suit will lie for the recovery of lands taken by the decree-holder in excess of the terms of his decree if the decree-holder has been put in possession of such lands by the officer of the Court executing the decree. *Mudhun Mohun Singh* v. *Kanye Doss Chuckerbutty* (1) referred to.

But where the suit has been instituted in the Court which had jurisdiction to execute the decree, the plaint may be regarded as an application to that Court for determining the question whether the lands are covered by the decree, and the suit does not therefore fail for want of jurisdiction.

Purmessuree Persad Narain Singh v. *Jankee Koer* (2) and *Azizuddin Hossein Ramanugra Roy* (3) referred to and followed.

[484] *Held* also that, in such a case, it is incumbent upon the defendant to raise the plea of jurisdiction in the Court of first instance, the question being not a pure question of law, but a question which would depend upon facts.

[F., 22 A. 121 (123) = 19 A. W. N. 219; 35 B. 24 (28) = 12 Bom. L.R. 712 = 7 Ind. Cas. 950; 22 M. 347 (349) = 9 M.L.J. 37; 8 O.C. 327 (337)(B); R., 18 A. 106 (107); 22 A. 376 (377) = 20 A.W.N. 129; 22 M. 494 (500); 28 M. 64 (66); 32 M. 425 = 4 Ind. Cas. 723; 5 Bom. L.R. 1036 (1041); 5 C.L.J. 328 (332); 8 C.L.J. 20 (25); 12 C.L.J. 312 (320) = 7 Ind. Cas. 55 (59); 8 C W.N. 49 (51); 17 C.P.L. R. 178 (182); 13 Ind. Cas. 133 (134) = 10 M.L.T. 527 = (1912) M.W.N. 44; 1 N.L. R. 1 (2); 2 O C. 366 (371); 7 O.C. 213 (215); 5 P.R. 1907 = 22 P.L.R. 1908 = 40 P.W.R. 1907.]

THE facts of this case and the arguments raised on behalf of the parties before the High Court on second appeal are sufficiently stated in the judgment.

Babu *Nalini Ranjan Chatterjee*, for the appellant.

Mr. *M. L. Sandel* and Babu *Karuna Sindhu Mukerjee*, for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows :—

JUDGMENT.

The plaintiff in this suit sued for the possession of certain jungle lands as belonging to his village Sealgazra. The defendant pleaded in his written statement that the claim was barred by limitation ; that the suit was barred by the provisions of s. 13 of the Civil Procedure Code by reason of a decree in suit No. 434 of 1880, which he (the defendant) had obtained against the plaintiff ; and that the lands appertained to his *mokurari* village Chaksha.

The Munsif found for the plaintiff. He held that the lands belonged to the plaintiff, and were not covered by the decree which the defendant had obtained against the plaintiff, and that the claim was not barred by limitation. On appeal by the defendant, a question was raised for the first time whether the suit was not barred by the provisions of s. 244 of the Code of Civil Procedure by reason of the defendant

* Appeal from Appellate Decree No. 703 of 1893, against the decree of Babu Krishna Nath Roy, Subordinate Judge of Manbhoom, dated the 10th of March 1892, affirming the decree of Babu Nandalal Kundu, Munsif of Raghunathpur, dated the 27th of December 1889.

(1) 12 B.L.R. 201. (2) 19 W.R. 90. (3) 14 C. 605

1895 JAN. 30. — APPELLATE CIVIL. — 22 C. 483.

having been put in possession of these lands in execution of his decree. The Subordinate Judge seems to have found that the defendant took possession in 1883 in execution of the decree, but that the executing Court made no enquiry as to the complaint then made by the plaintiff as to defendant having taken possession of more lands than were covered by the decree, and he has held that the lands being outside the decree, the plaintiff is entitled to maintain this suit. There is, however, a passage in the judgment of the Subordinate Judge which leaves it doubtful whether he did not mean to hold that, though the defendant took possession at the time of execution of the decree, he was not put in possession by **[485]** the officers of the Court. In the result, the Subordinate Judge affirmed the decree of the Court of first instance.

In second appeal, it has been contended before us, on behalf of the defendant, that upon the finding arrived at by the Subordinate Judge, that the defendant obtained possession of the lands in execution of the decree, the suit is barred by s. 244 of the Code.

It seems to us that, if the Subordinate Judge has found that the defendant was put in possession of the lands in execution of the decree by the officers of the Court, the case would clearly fall within the purview of the ruling in *Mudhun Mohun Singh* v. *Kanye Doss Chuckerbutty* (1). It would appear that immediately after the defendant's taking possession of the lands, the plaintiff applied to the Munsif executing the decree, on the 11th May 1883, and complained that the defendant had been given possession of land in excess of that decreed to him; upon which the Munsif recorded the following order: "The decree-holder has been put in possession of the lands decreed. The decree-holder has not taken out execution for costs. The case struck off the file." This order appears to us to mean that the Munsif then held that the decree-holder had been put in possession of only the lands decreed to him, and not of any excess land as maintained by the plaintiff (the then judgment-debtor).

If then the defendant was put in possession (as the plaintiff alleged in his petition of the 11th May 1883) of the excess lands in execution of the decree in 1883, the present suit would seem to be barred by the provisions of s. 244, which lay down that such a question as this must be decided by order of the Court executing the decree and not by separate suit. This has not been denied before us, but reliance has been placed by the respondent on the rulings of this Court in *Purmessuree Persad Narain Singh* v. *Jankee Kooer* (2) and *Azizuddin Hossein* v. *Ramanugra Roy* (3), and we have been asked to regard the plaint in this suit as an application made to the Court executing the decree, the suit having been instituted in the same Court as had jurisdiction to **[486]** execute the decree. We think that this view may be accepted, as the suit does not fail for want of jurisdiction, and the fact that the plaintiff has made his application in the form of a suit may be regarded as a merely formal defect which has done nobody any harm, except himself, as he had paid a higher Court fee than he need have paid. The facts of this case are, no doubt, (as was contended by the vakil for the appellant), somewhat similar to those of second appeal No. 1690 of 1893 decided by this Bench on the 14th instant, but in that case the suit was not brought in the Court which had jurisdiction to execute the decree, and the plaintiff in that case had been guilty of gross laches having slept over his rights for a period of 11 years 7 months.

(1) 12 B. L. R. 201. (2) 19 W.R. 90. (3) 14 C. 605.

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And there are other considerations which lead us to hold that we should not give effect to the plea as to jurisdiction raised by the defendant. This question is not a pure question of law, but a question which would depend upon facts. And therefore it was all the more incumbent upon the defendant to have raised it in the Court of first instance. There was no issue in that Court whether the defendant had been put in possession of the lands in execution of the decree, and therefore the Subordinate Judge in appeal was not properly called upon to decide this question upon the materials that were then before him. Then, again, the decision of the Subordinate Judge has just left it in doubt whether he meant to find that the defendant was put in possession through the officers of the Court commissioned for that purpose; for if he was not put in possession through the officers of the Court, the case would not fall within the ruling of this Court in *Mudhun Mohun Singh* v. *Kange Doss Chuckerbutty* (1).

Upon these grounds we dismiss this appeal, but we do not allow the plaintiff higher costs than he would be entitled to had he made an application under s. 244.

Appeal dismissed.

S. C. C.

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22 C. 487.

[487] CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Beverley.

MADURAY PILLAY AND ANOTHER (*Petitioners*) *v.* H. T. ELDERTON (*Opposite Party*).* [12th February, 1895.]

Sanction to prosecution—Criminal Procedure Code (Act X of 1882), s. 195—Subordinate Court, What is a—Jurisdiction of the High Court to revoke or grant sanction in cases in which appeal lies to "Her Majesty in Council" from the Court of the Recorder of Rangoon.

In matters relating to the grant of sanction to prosecute under s. 195 of the Criminal Procedure Code (Act X of 1882), a Court is regarded as "subordinate" to another Court where the latter is the Court to which appeals from the former ordinarily lie, *i.e.*, lie in the majority of cases.

Though the decree in the present instance was appealable to "Her Majesty in Council," still, as appeals from the Court of the Recorder of Rangoon ordinarily lay to the High Court, the former was held to be subordinate to the latter Court within the meaning of the section.

In re Anant Ramchundra Lotlikar (2) followed.

[R., 13 Cr. L.J. 498 (500)=15 Ind. Cas. 642=8 N.L.R. 57.]

THIS was an application to revoke the sanction granted by the Additional Recorder of Rangoon to prosecute the petitioners under s. 193 of the Indian Penal Code for giving false evidence. The facts of the case are these: The petitioners were charged with aiding and abetting one Gool Mahomed, who was charged with assaulting a person of the name of Elderton (opposite party). They were tried before the City Magistrate of Rangoon, who convicted them. All three appealed to the Recorder of Rangoon, and the conviction of Gool Mahomed was upheld, and that of the two petitioners was set aside. Then Elderton filed a suit in the Recorder's Court in which he claimed 20,000 rupees damages against the two petitioners for assault. The two petitioners gave evidence on their own

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* Criminal Revision Nos. 571 and 572 of 1894, against the order passed by H. T. Aston, Esq., Additional Recorder of Rangoon, dated the 13th of September 1894.

(1) 12 B. L. R. 201. (2) 11 B. 438.

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behalf in the civil suit. The result of the suit was that on the 22nd day of [488] August 1894, the Recorder passed a decree in favour of the plaintiff or damages to the extent of 4,000 rupees. The petitioners preferred an appeal against this decree to the High Court, being under the impression that an appeal lay to that Court. But the High Court decided that, under the provisions of s. 40 of the Lower Burma Courts Act (XI of 1889) an appeal lay direct to Her Majesty in Council, because the value of the subject-matter was more than 10,000 rupees, though the amount decreed was only 4,000 rupees.

On the 23rd day of August 1894, Elderton applied, under s. 195 of the Criminal Procedure Code, to the Additional Recorder of Rangoon, for sanction to prosecute the two petitioners for perjury in respect of their statements in the evidence given by them on their own behalf in the civil suit for damages, and the sanction was granted on the 13th day of September 1894.

Mr. *Henderson* appeared on behalf of the petitioners in support of the rule.

Mr. *M. Sandel* appeared on behalf of the opposite party.

Mr. *Henderson.*—The question arises whether this Court has any jurisdiction to set aside, if it should be disposed to, the sanction which has been granted by the Additional Recorder of Rangoon. The High Court has power to revoke the sanction, because appeals "ordinarily" lie to this Court from the Recorder's Court. Section 40 of the Lower Burma Courts Act (XI of 1889) says that an appeal shall lie to the High Court from an original decree or order passed by the Recorder in any suit or other civil proceeding of which the amount or value of the subject-matter is less than 10,000 rupees, and in the majority of cases the value of the subject-matter does not exceed 10,000 rupees. See s. 195, para. 7 of the Code of Criminal Procedure and the case of *In re Anant Ramchundra Lotlikar* (1).

Mr. *Sandel* was not called upon.

The judgment of the Court (NORRIS and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

The facts out of which these rules arise are these: One Gool Mahomed was charged with assaulting a person of the name of Elderton, and Maduray Pillay and Soobramoney Pillay were [489] charged with aiding and abetting Gool Mahomed in the assault. They were tried before the City Magistrate of Rangoon, who convicted them. All three appealed to the Recorder of Rangoon, and the conviction of Gool Mahomed was upheld, and that of the two Pillays was set aside ; and we are told by the learned counsel who has just addressed us on behalf of the petitioners that practically the Government Advocate withdrew the case as against these two persons, or at any rate intimated that in his opinion the evidence was not sufficiently strong to support the conviction. Subsequently Elderton filed a suit in the Recorder's Court in which he claimed 20,000 rupees damages against the two Pillays for assault. That case was tried, and the two Pillays, who were of course unable to give evidence on oath on their own behalf in the criminal case, availed themselves of their right to give evidence on their own behalf in the civil suit. The result of the suit was a decree in favour of the plaintiff for damages to the extent of 4,000 rupees. The defendants desired to appeal, and they were under the

(1) 11 B. 438.

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impression that an appeal lay to this Court. A Division Bench of this Court has decided that an appeal lies direct to Her Majesty in Council. These rules were granted in September 1894 by Mr. Justice Banerjee and Mr. Justice Sale in these terms: "Let a rule issue calling upon the opposite party to show cause why the order of the Recorder of Rangoon complained of and mentioned in the within petition should not be set aside," and the first question that arises is whether this Bench has any jurisdiction to set aside, if it should be disposed to, the sanction which has been granted by the Additional Recorder of Rangoon for the prosecution of the two Pillays for giving false evidence in the civil suit.

The decision of that question depends upon the construction of s. 195 of the Criminal Procedure Code, which, *inter alia*, says that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate." "For the purpose of this section any Court other than a Court of Small Causes shall be deemed to be subordinate to the Court to which appeals from the former Court *ordinarily* lie." The question is, do appeals from the Recorder or Additional Recorder of Rangoon [490] *ordinarily* lie to this Court? Upon the construction to be placed upon this section we are not left without authority. In the case of *Anant Ramchundra Lotlikar* (1) the facts were these: A decree-holder applied to the First Class Subordinate Judge for sanction to prosecute his judgment-debtor under ss. 206 and 424 of the Indian Penal Code for fraudulent concealment of certain moveable property worth about Rs. 10,000 awarded by the decree. This application was rejected by the Subordinate Judge. The District Judge declined to interfere, on the ground that the decree being appealable to the High Court, the High Court alone could deal with the application under s. 195 of the Criminal Procedure Code. Mr. Justice West and Mr. Justice Birdwood held that, though that decree was appealable to the High Court, still as appeals from the Court of the First Class Subordinate Judge ordinarily (that is, in the majority of cases) lay to the District Court, the former (that is, the First Class Subordinate Judge) was subordinate to the latter Court (that is the Court of the District Judge) within the meaning of s. 195 of the Criminal Procedure Code.

Appeals from the Recorder of Rangoon, in the majority of cases, lie to this Court; and, if for "the Court of the District Judge" we read "the High Court of Judicature at Fort William in Bengal" and for "the High Court" (that is, the High Court of Bombay) we read "Her Majesty in Council," the cases are exactly parallel. This decision commends itself entirely to our judgment, and we follow it and hold that we have jurisdiction to revoke this sanction if we thought that it was a case in which we ought to do so. But having heard Mr. Henderson upon the whole case, we do not think that it would be a proper exercise of our discretion to interfere with the sanction which has been accorded by the Additional Recorder of Rangoon.

Therefore these rules must be discharged.

S. C. B. *Rule discharged.*

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(1) 11 B. 438.

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MARCH 22.

ORIGINAL CIVIL.

22 C. 491.

22 C. 491.

[491] ORIGINAL CIVIL.

Before Mr. Justice Sale.

IN THE GOODS OF HENDERSON, DECEASED. [22nd March, 1895.]

Practice—Application for letters of administration by constituted attorney—Power of attorney executed in Glasgow—Verification—Declaration.

The Chief Magistrate of the City of Glasgow being a person lawfully authorized to administer oaths, a declaration as to the execution of a power of attorney taken before him and authenticated by his certificate and the common seal of the City of Glasgow and by a Notarial certificate is sufficient proof of the execution of the power.

THIS was an application for letters of administration under a power of attorney executed in Scotland in the presence of two witnesses, one of whom, a solicitor, made a declaration as to the execution of the power, under "The Statutory Declarations Act, 1835," before the Chief Magistrate of Glasgow. The declaration was authenticated by a certificate of the Chief Magistrate under the common seal of the City of Glasgow, and the certificate of the Chief Magistrate was authenticated by a certificate of a Notary Public under his hand and seal. The question was whether the declaration taken before the Chief Magistrate of Glasgow could be accepted as proof of the execution of the power.

The following note furnished by the Registrar fully states the question as it arose for decision :—

"This is an application for letters of administration under a power of attorney executed in Scotland in the presence of two witnesses, one of whom, described as 'Solicitor, Glasgow,' made a declaration before the Chief Magistrate of the City of Glasgow, who made a declaration before a Notary Public. The declaration before the Chief Magistrate is authenticated by his signature and the common seal of the City of Glasgow. The other declaration before the Notary Public is authenticated by his signature and official seal. Both declarations purport to have been made under s. 16 of 'The Statutory Declarations Act, 1835' [5 and 6 Will. IV, c. 62]. That section enacts, 'that it shall and may be lawful to and for any attesting witness to the execution of any will, codicil, deed, or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or [492] delivery of any such will, codicil, deed, or instrument in writing by such declaration in writing made as aforesaid, and every such Justice, Notary, or other officer (that is, as stated in the previous section, other officer now by law authorized to administer an oath) shall be and he is hereby authorized and empowered to administer or receive such declaration.'

"The Act, s. 15, also enacts, 'that a declaration taken under it shall have the same force and effect as if the person or persons making the same had appeared and sworn or affirmed the matters contained in such declaration *viva voce* in open Court or upon a commission issued for the examination of witnesses.'

"'The Statutory Declarations Act, 1835,' extends to the United Kingdom and Ireland, and is referred to in s. 120 (2) of 52 and 53 Vict., c. 50, as an Act under which a declaration may be taken in Scotland.

"A subsequent Act, 'The Probate and Letters of Administration Amendment Act, 1858' (21 and 22 Vict., c. 95), contains an important

provision, the effect of which is to extend to all places within Her Majesty's dominions the enabling provisions of 'The Statutory Declarations Act, 1835.' Section 32 enacts 'that affidavits, declarations, and affirmations to be used in the Court of Probate may be sworn and taken in Scotland, Ireland, the Isle of Man, the Channel Islands, or any Colony, Island, Plantation, or place out of England under the dominion of Her Majesty, before any Court, Judge, Notary Public, or person lawfully authorized to administer oaths in such Country, Colony, Island, Plantation, or place respectively, &c., &c., and all Registrars and other officers of the Court of Probate shall take judicial notice of the seal or signature, as the case may be, of any such Court, Judge, Notary Public, or person which shall be attached, suspended, or subscribed to any such affidavit, declaration, or affirmation, or to any other document.'

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"It thus appears that a declaration as to the execution of a power taken under 'The Statutory Declarations Act, 1835,' or 'The Probate and Letters of Administration Amendment Act, 1858,' at any place to which such Act extends, before a person 'lawfully authorized to administer oaths,' would be admissible in [493] England or Ireland as evidence of the execution of the power. It should for that purpose, if both conditions be fulfilled, be also admissible in this country as provided in s. 82 of the Indian Evidence Act, under which a document 'admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed . . . shall be admissible for the same purpose for which it would be admissible in England or Ireland.'

"In the present case the declaration was taken in Scotland, a place to which the Act extends, and it was taken before the Chief Magistrate of the City of Glasgow. The question then is whether the Chief Magistrate is a person 'lawfully authorized to administer oaths.'

"It is a matter of common knowledge that Glasgow is one of the Royal Burghs incorporated by Royal Charter. Its privileges are preserved under the Act of Union, 5 & 6 Anne, c. 8, art. XXI. The Act 6 Anne, c. 6, s. 2 provides for 'the appointment of Justices of the Peace in Scotland,' but (s. 3) so as not 'to alter or infringe any rights, liberties, or privilege heretofore granted to the City of Edinburgh *or to any other Royal Borough* of being Justices of the Peace within their respective bounds.'

"As a Royal Burgh, Glasgow is governed by a Town Council, which has the right to elect from its own members a Lord Provost or Chief Magistrate, who has jurisdiction to hold Courts: 3 and 4 Will. IV, c. 46, s. 136; 3 and 4 Will. IV, c. 77, as explained by 4 and 5 Will. IV, c. 87. In his judicial character as a Judge of any Court of record, he would be a Justice of the Peace: 2 Hawk, P. C., 38, c. 8, s. 3; 2 Step. Com. (3rd ed.), 622; (8th ed.), 644.

"By 33 and 34 Vict., c. 37, authority is given to the Senior Police Magistrate of every populous place in Scotland to act *ex officio* as a Justice of the Peace, *so that he may be in the same position as the Provost of Royal or Parliamentary Burghs.*

"There can, therefore, be no doubt that the Lord Provost of the City of Glasgow as Chief Magistrate and as Justice of the Peace has authority to administer oaths.

"The common seal of the City of Glasgow is not one of the [494] seals of which English Courts take judicial notice. But would not the

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English Courts be bound to take judicial notice of it when used by the Chief Magistrate for the special purpose mentioned in s. 32 of 'The Probate and Letters of Administration Amendment Act, 1858?' Indeed, under that section, would not the Chief Magistrate's signature alone be sufficient? It may be a question whether the provisions of that section would be applicable to a case where the declaration was taken under 'The Statutory Declarations Act, 1835.' In the present case, however, it is not necessary that these questions should be considered, inasmuch as the certificate of the Chief Magistrate is authenticated, not only by the common seal of the City of Glasgow, but also by a certificate of a Notary Public, whose official seal attached to his certificate is required to be judicially noticed by s. 57 of the Indian Evidence Act."

ORDER.

The following order was made by

SALE, J.—In this case an application was made for letters of administration under a power of attorney as to the execution of which a declaration was made before the Chief Magistrate of Glasgow. On the question whether that declaration is sufficient evidence of the execution of the power, I have been furnished with a very full note by the Registrar, Mr. Belchambers; I entirely approve of that note, and for the reasons therein stated, I think the declaration is sufficient proof of the execution of the power.

Attorneys for the applicants: Messrs. *Dignam, Robinson & Sparkes.*

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22 C. 494.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

SASI BHUSHUN RAHA (*Defendant*) *v.* TARA LAL SINGH DEO BAHADUR (*Plaintiff*).* [5th March, 1895.]

Transfer of Property Act (IV of 1882), s. 108, *sub-s. (j)—Liability of a lessee after transfer—Leases of non-agricultural character.*

To suits brought by a landlord against his lessee for rent based upon *kabuliyats*, the leases being of non-agricultural character, an assignee of [495] the lessee was made a party defendant on his own application. It was contended, on behalf of the lessee, that under the common law of India, it was competent for the tenant to rid himself of his liability by assignment, or at any rate by assignment and notice thereof to his landlord.

Held, that if there was such a common law in India enabling the tenant to put an end to his liability by transfer and notice, it did not at all events extend to leases of a non-agricultural character; and that s. 108, sub-s. (*j*), of the Transfer of Property Act, which governed the case, must be construed without reading it as governed by, or interpreted with reference to, any such principle, and that after a transfer by the lessee and notice thereof to the landlord, the liability of the lessee would not cease, merely at his pleasure, without any act or consent on the part of the landlord.

THIS appeal and two other similar appeals arose out of three suits brought by the plaintiff, lessor, against defendant No. 1, the lessee, for the rent of three leasehold properties, which accrued due after the lessee

* Appeal from Appellate Decree No. 232 of 1894, against the decree of Babu Debendra Lal Shome, Subordinate Judge of Manbhum, dated the 29th of November 1893, reversing the decree of Babu Taraprosanna Ghose, Munsif of Raghunathpur, dated the 10th of May 1893.

had transferred his rights in the leases to defendants No. 2. The assignee, on his own petition, was added as a party by the Court of first instance. The leases were of a non-agricultural character, for taking coal, stone, and limestone from three mouzahs. It was alleged that defendant No. 1, after transferring the leases to defendants No. 2, gave due notice of the transfer to the landlord. The Munsif gave a decree against defendants No. 2, the assignees, holding that inasmuch as defendant No. 1 had parted with his rights, and as the leases were of a permanent and transferable character, he could not be held liable for rent that fell due after the transfer. The plaintiff appealed. The lower appellate Court gave a decree against both defendants No. 1 and No. 2, on the ground that under s. 108, cl. (*j*), of the Transfer of Property Act, the liability of the defendant No. 1 did not cease even after the transfer or assignment.

Against this judgment, defendant No. 1 appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Jyoti Persad Sarvadhicary*, for the appellant.

Dr. *J. G. Apcar* and Babu *Jogesh Chunder Day*, for the respondent.

Dr. *Rash Behari Ghose.*—The lease is clearly a permanent one, and the lessee was entitled to sell whatever rights he had by the terms of the lease. There is no authority for the proposition that a lessee remains bound to pay rent notwithstanding a notice of **[496]** his assignment to the landlord. It is the common law of India that, on transfer of a tenure with notice, the lessee ceases to be liable for rent. When a lessee assigns his leasehold, if it is assignable, he is not liable for rent after the assignment.

There is not a single case in which in this country privity of contract has been held to continue after the privity of estate has ceased. In the case of *Kristo Bullav Ghose* v. *Kristo Lal Singh* (1) at p. 644 of the report, PETHERAM, C.J., said: "The liability here is a liability in consequence of the estate, and it is admitted that it is an ordinary rule that the liability ceases when the estate is transferred and the vendor ceases to have any estate in the property, but that in whatever way the transfer may be made, the liability remains on the original tenant until notice has been given to the landlord." I rely upon the notice. Under the English law, it would seem that both the assignor and the assignee may be made liable. The question is whether s. 108 of the Transfer of Property Act introduces the English law. I submit it does not. The change made by the Transfer of Property Act in the common law is that mere transfer without notice will not make a transferee non-liable. See *Panye Chunder Sircar* v. *Hur Chunder Chowdhry* (2). In the case of *Nilmadhub Sikdar* v. *Narattam Sikdar* (3) their Lordships doubted whether any estate is left in the landlord when he grants a permanent and heritable tenure. Under the English law an action on a covenant against the lessee after an assignment is not maintainable, unless there is an express covenant for liability. See *Thursby* v. *Plant* (4). There is no privity of contract apart from the privity of estate. See Woodfall on Landlord and Tenant, p. 272 (14th edition). In this country notice is insisted upon because the assignor ceases to be liable after the notice. See *Abdul Aziz Khan* v. *Ahmed Ali* (5), *Chintamoni Dutt* v. *Rash Behari Mondul* (6).

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(1) 16 C. 642. (2) 10 C. 496. (3) 17 C. 826.
(4) 1 Wms. Saunders, 230-*b*. (5) 14 C. 795. (6) 19 C. 17.

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Mr. *Apcar*, for the respondent.—In this case the plaintiff has not recognized the transferees, so that the lessee remains liable for rent. The transferee-defendants, who are a company, can wind up business at any time and [497] can avoid the liability for payment of rent. This is not a lease of agricultural land; not one contemplated by the Bengal Tenancy Act. I rely upon the concluding portion of cl. (*j*), s. 108, of the Transfer of Property Act. It is difficult to see how the principle laid down in *Thursby* v. *Plant* (1) applies to this case. The case of *Kristo Bullav Ghose* v. *Kristo Lal Singh* (2) proceeded upon s. 12 of the Bengal Tenancy Act, which does not deal with liability, but deals only with transfer. In any reading of the case it does not apply to the present one. If the Legislature had intended that there should be a limitation as to liability, they would have said so expressly. The case of *Panye Chunder Sircar* v. *Hur Chunder Chowdhry* (3) does not apply, as there the suit was for rent of agricultural land. Then again the case of *Abdul Aziz Khan* v. *Ahmed Ali* (4) refers to agricultural land also, and to a case where the transfer had been recognized. In the same way the case of *Chintamoni Dutt* v. *Rash Behary Mondul* (5) can be distinguished, as it is a case under the Bengal Tenancy Act. In the present case the Bengal Tenancy Act does not apply, as the case comes from Purulia where Act X of 1859 is in force. In the case of *Shalgram* v. *Kubirun* (6) it was held that suits for rent under mining leases do not fall within the purview of cl. (4), s. 23, Act X of 1859. This case does not come under s. 23 of Act X of 1859. The leases are not of a permanent character, as there is a distinct right of re-entry. If this is a suit upon a covenant, as the other side contends, then both the lessee and the assignee are liable. Where there has been an assignment the lessee's liability does not cease, whether there has been an express covenant or not. It does not matter whether there has been acceptance, the landlord can sue both the lessee and the assignee upon the covenant. See *Orgill* v. *Kemshead* (7). If the claim is brought as a debt, still the lessee is liable. In the leases there is a power given to transfer the right, but no power given to extinguish the liability.

[498] Dr. *Rash Behari Ghose* in reply.

The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows :—

JUDGMENT.

In each of the three suits out of which these appeals arise, the plaintiff sues the defendant No. 1 for rent due under a lease granted by the plaintiff to that defendant. In each case the lease is admitted, the rent is admittedly due, and the only defence is that the defendant No. 1 has assigned to the defendants No. 2 the lease under which the rent has become due.

In each case the defendants No. 2 were added as parties defendant, apparently at their request. The Munsif made in each case a decree against the defendants No. 2 alone. On appeal the Subordinate Judge has held (in one judgment disposing of all the cases) that the defendant No. 1 is liable: and has made a decree against him, letting the decree against the defendants No. 2 stands as against them. Defendant No. 1 appeals.

(1) 1 Wms. Saunders 230-*b*. (2) 16 C. 642. (3) 10 C. 496.
(4) 14 C. 795. (5) 19 C. 17.
(6) 3 B.L.R. A.C. 61 = 11 W.R. 400. (7) 4 Taunt. 642.

In each case *kabuliyats* only are put in evidence: we are told that no *pottahs* were executed.

In appeal 249 the suit is for rent for one year, from Assin 16th, 1298, to Assin 15th, 1299: the lease is of the right to cut and take limestone from plaintiff's Mouzah Bagmara at the annual jumma of Rs. 300.

In appeal No. 232 the suit is for rent for one year from Aughran 1298 to Kartik 1299: the lease is of the right of mining and taking coals in and from the plaintiff's Mouzah Uttrara at the annual jumma of Rs. 900.

In appeal 250 the suit is for arrears of rent for 1298 and for the Sraban kist of 1299; the lease is of the right of cutting stones from nine hillocks in Mouzah Nadnara at the annual jumma of Rs. 200.

The quarrying lease, that in appeal 250, does not purport to give an interest to the lessee beyond the term of his own life. The two other leases purport to confer the interest for a larger period. In 249 the right is given to the lessee and his heirs; in 232, to the lessee, to his sons, son's sons, and so on in succession.

[499] The judgment of the lower appellate Court was given in the case concerning the first mentioned lease, that in question in appeal No. 250, in which the lease does not purport to extend beyond the lessee's life. As to all the leases the lower appellate Court held that defendant No. 1 could not, by reason of having assigned to the defendants No. 2, claim exemption from liability to pay rent to the plaintiff even if the rent claimed be for a period subsequent to the sale.

In all three cases the assignments to the defendants No. 2 were made on the 24th Assar 1298.

It is not contended that the plaintiff accepted defendants No. 2 as his tenant, at or after the time of the assignment, or at any time.

The case is governed by the provisions of s. 108, sub-s. (*j*), of the Transfer of Property Act: "the lessee may transfer absolutely, or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. Nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee." It was argued that this provision must be interpreted with reference to the ordinary law of India with respect to the relation of landlord and tenant at the time the Act was passed. It was contended that, according to that law (described in the argument addressed to us as the "common law" of India), it was competent for the tenant to rid himself of his liability to pay rent by assignment, or at any rate by assignment and notice thereof to his landlord. With reference to this, a construction was urged of the words in sub-s. (*j*): "the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." It was contended that, although the mere transfer would not put an end to the lessee's liability under this provision, notice by the tenant to the landlord of such transfer would, combined with the **[500]** transfer itself, do so; as this, it was said, was the general rule of law relating to the relation of landlord and tenant in India at the time the Transfer of Property Act was passed.

We shall assume, for the purposes of this argument, that in this case such a notice of the transfer as is contended would be sufficient, was in

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fact given. Assuming this to have taken place we do not think that under sub-s. (j) the liability of the tenant under the lease would cease by the reason of such transfer and such notice.

If there was such a common law of India as was contended for, enabling the tenant to put an end to his liability by transfer and notice (we express no opinion as to whether there was or was not), it did not, at all events, extend to leases of a non-agricultural character such as these: and we think that in this case the sub-section must be construed without reading it as governed by, or interpreted with reference to, any such principle.

We must interpret the words of the provision by themselves. The sub-section provides that the liability of the lessee shall not cease by reason only of the transfer; and we think that this cannot imply that it may be made to cease merely at his pleasure, upon notice to his landlord. His liability to the landlord is expressly preserved, notwithstanding the transfer: that is to say, the landlord's right to the benefit of his contract with the lessee is expressly preserved to him, unaffected by the transfer itself. We can find nothing in the sub-section itself to countenance the construction of it, that a right so belonging to the landlord may be put an end to without any act or consent on his part and solely at the will of the person on whom the liability rests.

We say nothing whatever about agricultural leases: and nothing that we now say can be taken in any way, by implication or otherwise, to suggest any opinion about them, one way or the other. We hold that the liability of the defendant No. 1, the appellant in these appeals, is in no way modified by his transfer to defendants No. 2, or by any notice of it, if he ever gave any, to the plaintiff respondent, and we dismiss these appeals with costs.

S. C. C. *Appeals dismissed.*

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22 C. 501.

[501] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

S. E. COFFIN (*One of the Defendants*) *v.* KARBARI RAWAT AND ANOTHER (*Plaintiffs*).* [20th February, 1895.]

Right of Suit—Question relating to execution, &c. of decree. Decree for costs—Sale of immoveable property—Reversal of decree on appeal—Suit for recovery of mesne profits—Civil Procedure Code (Act XIV of 1882*)*, ss. 244, 583.

A brought a suit against *B* for compensation, but it was struck off, and *B* obtained a decree for costs. *A* appealed, but pending the appeal *B* executed his decree, and, in execution thereof, purchased a certain immoveable property of *A*, and took delivery of possession. The appellate Court remanded the case for re-trial on the merits, and a decree was passed by the Court of first instance in *A*'s favour, which was confirmed on appeal, and he got back his property. *A* then brought a suit for the value of crops wrongfully appropriated by *B* during the period he was in possession. It was contended on second appeal that such a suit was barred by the provisions of s. 244 of the Civil Procedure Code.

Held, that the question to be decided in this suit did not relate to the execution, discharge, or satisfaction of the original decree within the meaning of s. 244, because it did not arise at all until that decree had ceased to exist, and such a suit was not barred by the provisions of that section.

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* Appeal from Appellate Decree No. 1276 of 1893, against the decree of Babu Anantaram Ghose, Second Subordinate Judge of Sarun, dated the 9th of March 1893, affirming the decree of Babu Gunnessyam Gupta, Munsif of Motihari, dated the 31st of March 1892.

Lati Koer v. *Sobhadra Kooer* (1), *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (2), *Hameeda* v. *Bhudhun* (3), *Bamasoonduree Dabee* v. *Tarinee Kant Lahooree* (4), *Duljeet Gorain* v. *Rewal Gorain* (5), *Ram Roop Singh* v. *Sheo Golam Singh* (6), *Ram Ghulam* v. *Dwarka Rai* (7), referred to. *Mothoora Pershad Singh* v. *Shumbhoo Geer* (8) distinguished.

THE plaintiffs brought a suit for compensation against the defendant No. 1; but it was struck off by the Court of first instance and the defendant got a decree for costs. The plaintiffs then appealed, but pending the appeal the defendant executed his decree and caused certain property belonging to the plaintiffs to be sold. [502] He purchased it himself on the 7th January 1889, and then took delivery of possession. On the 14th June 1889 the appellate Court set aside the decision of the Court of first instance, and remanded the case for re-trial. The case being re-tried, a decree was passed in favour of the plaintiffs, and it was upheld on appeal on the 13th March 1890. The plaintiffs then brought this suit for the value of crops taken away by the defendant during the period they were kept out of possession. The defence raised in this case was that no separate suit for *wasilat* would lie, and that the plaintiffs ought to have taken proceedings in the execution department. The Munsif, disallowing this objection of the defendant, decreed the suit of the plaintiffs. On appeal the Subordinate Judge, relying upon the case of *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (2) confirmed the decree of the Munsif.

Against this judgment the defendant No. 1 appealed to the High Court.

Babu *Satis Chandra Ghose*, for the appellant, contended that in *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (2) this point was not decided at all; the learned Chief Justice simply expressed an opinion. Section 244, Civil Procedure Code, is a bar to the suit of the plaintiffs:—See *Mothoora Pershad Singh* v. *Shumbhoo Geer* (8), *Bamasoonduree Dabee* v. *Tarinee Kant Lahooree* (4). Section 244 of the Civil Procedure Code (Act XIV of 1882) has a wider scope than s. 11 of Act XXIII of 1861, referred to in *Mothoora Pershad Singh* v. *Shumbhoo Geer* (8). Under s. 583, Civil Procedure Code, when a party is entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal, he should apply for execution to the Court which passed the decree against which the appeal was preferred, and such Court should proceed to give effect to the decree of the appellate Court, giving the successful party the full benefit thereof, and restoring him to the position in which he was before the decree of the first Court was executed.

The appellate Court, in setting aside a decree, is bound to [503] make complete restitution. See *Lati Koer* v. *Sobhadra Kooer* (1), *Hameeda* v. *Bhudhun* (3), and *Duljeet Gorain* v. *Rewal Gorain* (5).

Mr. *Mahmudul Huq* and Moulvie *Mahomed Isfaq*, for the respondents, contended that such a suit would lie. See *Shama Pershad Roy Chowdhury* v. *Hurro Pershad Roy Chowdhry* (9) and *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (10).

Babu *Satis Chandra Ghose*, in reply, said that the cases cited by the other side had no application to this case.

The judgment of the High Court (MACHPHERSON and AMEER ALI, JJ.) was as follows:—

(1) 3 C. 720. (2) 14 C. 484. (3) 20 W.R. 238.
(4) 20 W.R. 415. (5) 22 W.R. 435. (6) 25 W.R. 327. (7) 7 A. 170.
(8) 19 W.R. 413. (9) 10 M.I.A. 203. (10) 3 C. 30.

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JUDGMENT.

The facts as stated are these: Some of the plaintiff's land was sold in execution of a decree which had been made against him for costs, and was purchased by the defendant, the decree-holder. The decree was afterwards reversed and the plaintiff, who had got back his land, brought this suit to recover from the defendant the value of the crops which the defendant took while the land was in his possession. The defendant, in addition to denying that the plaintiff has any case on the merits, has contended from the first that s. 244 is a bar to the suit, and that a claim such as this can only be made to, and dealt with, by the Court executing the decree as a part of the execution proceedings.

Both the Courts have overruled this contention, and on the merits have given the plaintiff a decree, although not to the full extent of the claim. It is now contended, and this is the only contention in the appeal, that s. 244 is a positive bar to a separate suit, and that the Courts were wrong in holding that a separate suit would lie.

The cases seem clear on this point, that a Court executing a decree, which is afterwards reversed on appeal, has full power to restore to the judgment-debtor what was taken from him in the execution, and that it should, as far as possible, restore the parties to the position they were in before the decree was executed. So **[504]** also it has been held that, when possession of land is given in execution of a decree which is afterwards reversed, the Court which executed the decree can, in addition to the restoration of the land, give mesne profits or compensation in respect of the time during which the person against whom the decree was executed was out of possession. See the cases of *Mothoora Pershad Singh* v. *Shumbhoo Geer* (1), *Lati Koer* v. *Sobhadra Kooer* (2), and *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (3).

It is not so clear, however, whether the power is inherent in the Court, or whether it is exercised under s. 244 of the Code, or by way of execution of the appellate Court's decree.

The case most strongly in appellant's favour is *Mothoora Pershad Singh* v. *Shumbhoo Geer* (1): there certain property of the judgment-debtor was sold in execution of a decree for money which was afterwards modified in appeal; the sale proceeds did not amount to the full judgment-debt, as originally decreed, but exceeded the amount recoverable under the decree as modified in appeal. The judgment-debtor brought a suit against the judgment-creditor to recover the excess money, and it was held that the suit was not maintainable, and that his only remedy was under s. 11, Act XXIII of 1861, which was then in force. This case may, perhaps, be distinguished on the grounds that the whole decree was not, as here, set aside; that the language of s. 11, Act XXIII of 1861, which was relied on, was somewhat different from the language of s. 244; and that the suit was to get back what had been actually made over by the Court and not something incidental to that. The other cases cited, *Hameeda* v. *Budhun* (4), *Bama Soonduree Dabee* v. *Tarinee Kant Lahooree* (5), *Duljeet Gorain* v. *Rewal Gorain* (6), and *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (3), are also distinguished either on the facts, or on the ground that, although it is held that relief, such as is claimed in this suit, could be given by the Court executing the decree, it is not held that a separate suit for it could not be maintained. In the cases of *Bama Soonduree Dabee*

(1) 19 W.R. 413. (2) 3 C. 720. (3) 14 C. 484.
(4) 20 W.R. 238. (5) 20 W.R. 415. (6) 22 W. R. 435.

v. *Tarinee* **[505]** *Kant Lahooree* (1) and *Duljeet Gorain* v. *Rewal Gorain* (2) the original decree was not altered, but it was found in the one that the decree-holder had taken in execution land which was in excess of the decree, and in the other that he had taken land which was not at all covered by the decree, and the relief asked for properly fell within the provision relating to the execution of decrees. In the case of *Mookoond Lal Pal Chowdhry* v. *Mahomed Sami Meah* (3) Petheram, C. J., expressed a decided opinion that, although the Court executing the decree could, when restoring the land, give further relief in the form of mesne profits by way of restitution, the claim for that relief was not a matter which had to be disposed of under s. 244, and consequently that it might be made in a separate suit. The case of *Ram Roop Singh* v. *Sheo Golam Singh* (4) and *Ram Ghulam* v. *Dwarka Rai* (5) also show that a suit such as the present one is maintainable.

Unless the question to be decided in this suit is one which clearly related to the execution, discharge, or satisfaction of the decree, the suit is not prohibited by s. 244. It did not, we think, relate to the execution discharge, or satisfaction of the original decree within the meaning of s. 244, because it did not arise at all until that decree had ceased to exist. Section 583 provides that the decree of an appellate Court, by which a party is entitled to any benefit (by way of restitution or otherwise), is to be executed on the application of the person entitled to the benefit by the Court which passed the decree against which the appeal was preferred. Could therefore the plaintiff have got what he now seeks to get in execution of the decree of the appellate Court which simply reversed the decree of the first Court? Conceding that the reversal carried with it a right to the restitution of what had actully been made over under the decree reversed, and that on the authority of the cases cited, the Court executing the appellate decree could have given the relief now asked for, on the general principle that the parties are to be restored as far as possible to the position they before occupied we think that **[506]** the plaintiff was not restricted to that particular way of getting it. The decree of the appellate Court did not direct that this particular relief should be given, nor did it direct that any enquiry should be made in connection with it: the plaintiff did not ask the execution Court to give him this relief, and the question whether he was entitled to it can hardly be regarded as one relating to the execution, discharge, or satisfaction of that decree.

We think, therefore, that the Courts have rightly held that the suit is maintainable, and that the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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(1) 20 W. R. 415. (2) 22 W. R. 435. (3) 14 C. 484.
(4) 25 W. R. 327. (5) 7 A. 170.

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APPELLATE CIVIL.

22 C. 506.

22 C. 506.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

RAM KAWAL SINGH AND OTHERS (*Plaintiffs*) *v.* RAM KISHORE DAS AND ANOTHER (*Defendants*).

RAM KISHORE DAS AND ANOTHER (*Defendants*) *v.* RAM KAWAL SINGH AND OTHERS (*Plaintiffs*).* [15th February, 1895.]

Hindu Law—Widow—Mitakshara—Power of a Hindu widow to dispose of property for religious and charitable purposes—Spiritual welfare of the widow and not that of her deceased husband—Suit to set aside alienation by reversioners.

A Hindu widow, inheriting the estate of her deceased husband *K*, executed a deed of endowment in favour of the *pujari* of a *thakurbari* temple established by her deceased husband's mother. In a suit brought by the reversionary heirs of her deceased husband, after the death of the widow, to set aside the alienation: *Held* that, inasmuch as the idol was established by the mother of the deceased *K*, and he had made no provision for its maintenance, and the dedication was *prima facie* one for the widow's own spiritual welfare, not for that of her deceased husband *K*, and because the property alienated was of considerable value, the alienation was not valid against the reversioners, either on the ground of religious necessity, or that being for a pious purpose the property alienated represented only a small portion of the estate inherited by the widow.

Collector of Masulipatam v. *Cavaly Vencata Narainapah* (1), *Lakshmi Narayana* v. *Dasu* (2), *Puran Dai* v. *Jai Narain* (3), *Rama* v. *Ranga* (4) referred to.

[R., 34 M. 288 (291)=6 Ind. Cas. 240=20 M.L.J. 798 (802)=8 M.L.T. 74=(1910) M.W.N. 222; A.W.N. (1908) 202 (203); 17 C.W.N. 782 (787)=19 Ind. Cas. 417 (420); 18 C.L.J. 633 (636)=22 Ind. Cas. 594.]

[507] THESE two appeals arose out of an action brought by the plaintiffs, Ram Kawal Singh and others, to set aside an alienation of certain immoveable property made by a Hindu widow by a deed of endowment. One Babu Kuldip Narayan Singh died, leaving a widow, Mussamat Dhanesh Kunwar, who by a deed of endowment, dated 1865, alienated 16as. of Mouzah Ahmadpore, in favour of one Kamal Das, *pujari* of a *thakurbari* (temple) established by the mother of her deceased husband. After the death of Kamal Das, Ram Kishore Das, a *chela* of his, obtained the certificate of succession, and entered into possession of the said property. The widow died in 1886, and the plaintiffs, as reversioners of the late Babu Kuldip Narayan Singh, brought this suit in the Subordinate Judge's Court of Patna to set aside the alienation in question, as well as for possession, on the ground that the widow had no power to dispose of the property by the deed of endowment. The defence was that the mouzah was the self-acquired property of the widow, and even if it was not so, the widow had full power to alienate it, as it was done for religious and pious purposes. The Subordinate Judge held that the property was not the self-acquired property of the widow, and that the alienation was not valid and binding upon the reversioners; but he, in decreeing the plaintiffs' suit, excluded from plaintiffs' possession the bungalow, *thakurbari*, and the garden attached to it, and the gods and their ornaments, &c., which were stated in the *zurpeshgi* deed of Kuldip Narayan, bearing date the 4th July 1857.

Against this decree both the plaintiffs and the defendants appealed to the High Court.

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* Appeals from Original Decrees, Nos. 199 and 217 of 1893, against the decree of Babu Karuna Das Bose, Subordinate Judge of Patna, dated the 10th of April 1893.

(1) 8 M.I.A. 500. (2) 11 M. 288. (3) 4 A. 482. (4) 8 M. 552

In No. 217 of 1893: Babu *Karuna Sindhu Mookerjee* and *Luchmi Narayan Singh*, for the appellants. 1895 FEB. 15.

Babu *Saligram Singh* and Babu *Mohabir Sahay*, for the respondents.

In No. 199 of 1893: Babu *Saligram Singh* and Babu *Mohabir Sahay*, for the appellants. APPELLATE CIVIL.

Babu *Karuna Sindhu Mookerjee* and Babu *Luchmi Narayan Singh*, for the respondents.

Babu *Karuna Sindhu Mookerjee* argued that the widow had **[508]** full power to alienate the property inherited from her husband for religious and charitable purposes, referring, in support of his contention, to the Viramitrodaya, Golap Chunder Sarkar's translation, p. 141; Jogendra Nath Siromoni's Commentaries on Hindu Law, 2nd edn., pp. 44 and 525; *Jugjeevun Nuthoojee* v. *Deosunker Kaseeram* (1); *Kupoor Bhuwanee* v. *Sevukram Sheo Shunker* (2); *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (3) and *Puran Dai* v. *Jai Narain* (4). A widow cannot endow an idol with her husband's property to the detriment of the reversioners: *Kartick Chunder Chuckerbutty* v. *Gour Mohun Roy* (5); therefore, only in cases of detriment to the reversioners an alienation like the present one is invalid. No detriment has been proved in this case. 22 C. 506.

Babu *Saligram Singh*, for the respondents.—A widow has no power to alienate property inherited from her husband for her own spiritual welfare. It must be for the spiritual benefit of her husband. See *Lakshmi Narayana* v. *Dasu* (6); *Rama* v. *Ranga* (7); and he also relied upon *Kartick Chunder Chuckerbutty* v. *Gour Mohun Roy* (5).

Babu *Karuna Sindhu Mookerjee* replied.

The judgment of the High Court (MACPHERSON and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

These two appeals, which arise out of one suit, are preferred by the plaintiffs and by the defendant respectively.

The plaintiffs are the reversionary heirs of Kuldip Narain Singh, who died a good many years ago, leaving a widow, Dhanesh Kunwar. She, having inherited his estate, died in 1886. The defendant is the *pujari* of an idol to which Mouzah Ahmadpore Khas, which it is sought to recover in this suit, was dedicated and given by Danesh Kunwar in 1865.

The plaintiffs allege that the permanent alienation of her husband's property for such a purpose is invalid. The defence is that the mouzah was the self-acquired property of the widow, and, that even if it was not, the alienation was good and effective.

[509] The Subordinate Judge found that the mouzah belonged to Kuldip Narain, and devolved on his widow as heiress, and that she had no power to alienate it permanently by dedicating and giving it to the idol. He consequently gave the plaintiffs a decree, excluding only a small portion of the land, and it is to this excluded portion that the plaintiffs' appeal (No. 199) relates. The appeal of the defendant (No. 217) raises the same questions which were raised in the lower Court, and it will be convenient to consider this first.

The finding that the mouzah belonged to Kuldip Narain, and that it was not acquired by his widow, is unquestionably right for the reasons

(1) Borrodaile. Ed. of 1862, 436. (2) Borrodaile, Ed. of 1862, 448.
(3) 8 M.I.A. 500. (4) 4 A. 482. (5) 1 W.R. 48.
(6) 11 M. 288. (7) 8 M. 552.

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given by the Subordinate Judge, and has hardly been questioned before us. The point which has been pressed is the validity of the alienation.

It is argued, on the strength of certain texts in the Mitakshara, that the widow had absolute power to alienate for religious purposes property which she inherited from her husband, and in support of the argument two cases, reported in Borrodaile's Reports, Vol. I, pp. 394 and 415 (1) were cited. Those cases are of very ancient date, the facts are not fully reported, it does not appear what proportion the property alienated bore to the whole estate, and, in so far as they may purport to support the argument broadly put forward, they are not consistent with the later cases on the subject.

In the *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (2) their Lordships say that "for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, the widow has a larger power of disposition than that which she possesses for purely worldly purposes." No case has gone the length of holding that the power of disposition for pious and religious purposes is unqualified. In the case of *Lakshmi Narayana* v. *Dasu* (3) the alienation was upheld, on the ground that it related to a very small piece of land, and was, for an indispensable religious necessity, not for the spiritual welfare of the widow, but for that of her husband. In the case of *Rama* v. *Ranga* (4) it was held that the pious purpose [510] must be in the nature of a spiritual necessity, unless at least the alienation was reasonable in the circumstances of the family, and the property alienated was but a small portion of the property inherited from the husband. In the case of *Puran Dai* v. *Jai Narain* (5) much the same view was taken.

Here the idol to which the land was given was not established by Dhanesh Kunwar's husband, but by his mother. The husband had not in his lifetime thought it necessary to make any provision for the maintenance of the idol, and the dedication was *prima facie* one more for widow's own spiritual welfare than for that of her husband. The property alienated was, moreover, of considerable value, and, according to the only evidence there is on the subject, represented nearly one-third of the estate inherited. The alienation cannot, therefore, be supported, either on the ground that it was for a religious necessity, that is to say, for the spiritual welfare of her husband, or that, being for a pious purpose, the property alienated was small in value and represented only a very small portion of the estate inherited. We think, therefore, that the Subordinate Judge has rightly held that it cannot hold good against the reversioners, and that the defendants' appeal fails.

The Subordinate Judge was, however, wrong in excluding, from the land decreed, the bungalow house, *thakurbari* and the garden attached to the *thakurbari*, and the land generally referred to in the *zurpeshgi* lease executed by Kuldip Narain on the 4th July 1857. He has done so on the ground that Kuldip Narain, having excluded these properties from the operation of the lease, exercised no right of ownership over them. This, however, is not a proper inference. All that can be said is that he wished to, and did, retain them in his own possession, and so excluded them. Apart from the deed of 1865 executed by Dhanesh Kunwar, it is not alleged that there was any dedication or any alienation of the excluded properties, and if the deed fails, it must fail also as regards these.

(1) Edition of 1862, pp. 436, 448. (2) 8 M. I. A. 500 (550). (3) 11 M. 288.
(4) 8 M. 552. (5) 4 A. 482.

The result is that the defendants' appeal fails and must be dismissed with costs, and that the plaintiffs' appeal succeeds. The [511] decree will be amended by striking out the words "save and except the bungalow house, *thakurbari*, and the garden attached to the *thakurbari*, and gods and their ornaments, &c., which are stated in the *zurpeshgi* deed of Kuldip Narain bearing date the 4th July 1857." The plaintiffs will get their costs in their appeals.

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Appeal No. 199 *allowed.*
Appeal No. 217 *dismissed.*

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22 C. 511.

ADMIRALTY JURISDICTION.

Before Mr. Justice Sale.

IN THE MATTER OF THE BRITISH SAILING SHIP "FALLS OF ETTRICK." THE "CHUSAN" *v.* "FALLS OF ETTRICK" AND THE OTHER CAUSES. [5th December, 1894.]

Practice—Admiralty jurisdiction—Application for consolidation of salvage claims—Civil Procedure Code (Act XIV of 1882)*—Rules and Regulations under* 2 *and* 3 *Will. IV*, c. 51.

On an application by the impugnant for the consolidation of three separate salvage claims made by three different promovents for salvage services rendered by them:

Held (following the more recent English practice), that the claims should not be consolidated against the will of the promovents, but should be heard one after the other successively, subject however to one set only of costs being allowed to them in the event of the Court finding at the hearing that the application for consolidation was resisted without sufficient grounds.

In such a case, (as there is no procedure for such an application prescribed by the Rules and Regulations made in pursuance of 2 and 3 Will, IV, c. 51, nor any procedure for consolidation in the Civil Procedure Code), the practice of the Court of Admiralty in England ought to be followed so far as such practice can be applied to this country by analogy.

[R., 27 C. 860 (889 and 891); 16 C.L.J. 591 (594) = 17 C.W.N. 526 (528) = 15 Ind. Cas. 897.]

IN this case a rule had been granted calling upon the promovents, the owners, masters, and crew of the P. & O, SS. "Chusan," the steam tug "Warran Hastings," and the steam tug "Resolute" to show cause why the separate actions brought by them for salvage against the ship "Falls of Ettrick" should not be consolidated and heard together, and why the conduct of the said suits, when consolidated, should not be given to one set of attorneys for the promovents.

[512] The facts, so far as they are material, were as follows :—

During bad weather at the Sandheads on 25th July 1894, the "Falls of Ettrick" applied to the "Chusan" for help, and the "Chusan," at considerable risk to herself, took the "Falls of Ettrick" in tow and towed her into twelve fathoms of water, when the cable parted; the "Chusan" then took off the pilot and crew of the "Falls of Ettrick": for this act of salvage they claimed the sum of Rs. 1,50,000. On the following morning, when the weather was calmer, the "Resolute" found the "Falls of Ettrick" with nobody on board; they went on board and then left the vessel: for this they claimed Rs. 6,500 for salvage. The "Warran Hastings," on the same day, took back the pilot, captain, and part of the crew of the "Falls of Ettrick," cleared away the wreckage, and towed her into Calcutta: for this they claimed £ 3,000 as salvage.

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Mr. *Jackson* and Mr. *O'Kinealy*, for the "Falls of Ettrick."

Mr. *Phillips* and Mr. *Dunne*, for the "Chusan."

Mr. *C. P. Hill*, Mr. *T. A. Apcar* and Mr. *Graham*, for the "Warren Hastings."

Mr. *Pugh*, for the "Resolute."

Mr. *Jackson.*—These are three claims for salvage in respect of services alleged to have been rendered by the vessels above named, and these claims should be consolidated and heard together. The practice is that the Court generally makes an order for consolidation when it is applied for by the defendants (or impugnants). If consolidation is not granted the Court should only allow one set of costs, and those costs should be apportioned according to the amount of salvage awarded in each case. It was clearly laid down in *The "Melpomene"* (1) that if claims were made for different services rendered to the same vessel, it was usual to allow consolidation, and that ruling was followed by Pigot, J., in *Peacock* v. *Byjnath* (2). It would occasion enormous costs if the same evidence were to be taken over again. In all these claims the suits should be consolidated. If all the parties appear at one hearing, there should not be separate sets of costs, but the order should be made on [513] the condition that the Court would disallow the costs if it should think necessary: *The "Longford"* (3).

Mr. *Phillips*, for the "Chusan."—Is the "Chusan," which has brought an action independently of any other claimant, to be prejudiced by having her claim mixed up with others? Claims in order to be consolidated must be consistent with one another. Here they are not; they are quite distinct. I do not want a repetition of the evidence. The evidence in favour of the "Resolute" would not be likely to be of use to the "Chusan," though it might be that the "Chusan's" evidence would be of use to the "Resolute." There is no common action nor indeed anything in common between the "Chusan" and the others. No authority has been shown for ordering consolidation in a case of this kind; on the contrary there is an authority the other way; see *The "Charles Adolph"* (4). [SALE, J.—The English practice in recent days seems to be not to grant an order for consolidation if the other side objects to it: Williams' and Bruce's Admiralty Practice, 387.] In the case of *The "Jacob Landstrom"* (5) the decision in *The "Melpomene"* (1) was considered and not altogether followed by the learned Judge who tried both cases. If all the parties were fighting the same battle there might be consolidation, but not where each was fighting for his own hand.

SALE, J.—If the question really would be as to how much of the salvage you are entitled to, it seems desirable that that should be settled in one proceeding rather than that it should come (as it might) at two different times before two different Judges.] I do not think my argument could involve that result. My point is, ought the Court to force upon the "Chusan" the evidence adduced by the "Warren Hastings" and upon the "Warren Hastings" the evidence adduced by the "Chusan"? For that would be the effect of the consolidation asked for. I do not object to there being only one hearing, provided that the facts relied on by each claimant are placed before the Court one after another.

Mr. *Hill*, for the "Warren Hastings."—It seems to be assumed in argument in support of this application that it was a matter of right to have consolidation merely on asking for it. There is no [514] authority

(1) L.R. 4 Ad. and E. 129. (2) 10 C. 58. (3) L.R. 6 P.D. 60.
(4) Swabey 153. (5) 4 P. and D. 191.

for such a proposition. It is sought to consolidate these actions, however different the services rendered, however different the circumstances under which the services were rendered. It is not enough to have some facts common to the several claimants, the whole body of facts must be practically the same. Both as a matter of justice and as one of convenience, it would be better not to consolidate the suits ; and moreover the parties were entitled to bring separate actions ; see *The "Charles Adolph"* and other cases referred to in Pritchard's Admiralty Digest, p. 244.

Mr. *Pugh* for the "Resolute" also opposed the consolidation of the different actions.

Mr. *Jackson* in reply.—The case of *The "Charles Adolph"* (1) and other cases in Pritchard's Digest, p. 244, are relied on as authorities against this application. But in every single one of those cases consolidation was ordered. Nor has any case been cited in which consolidation has been refused, except on terms practically the same. Even in the cases where the interests of one claimant were opposed to those of another, the suits were consolidated. Why should the "Falls of Ettrick" submit to three separate applications for appraisement, inspection, and so on. Consolidation is in fact more often and more strictly ordered in Admiralty cases than in any other. Section 647 of the Civil Procedure Code does not apply ; for by the Colonial Admiralty Courts Act, 1890, s. 16, it is expressly declared that the Code shall not apply except when the provisions of the Act do apply. These suits were instituted, not under the Code, but under the Admiralty rules. I ask that it may be declared that the Civil Procedure Code does not apply.

ORDER.

SALE, J.—This is an application for an order that these three actions for salvage may be consolidated and heard together.

The application is made on behalf of the impugnant and is resisted by the promovents in each of the actions, on the ground that the several claims are based, not upon the same, but upon different circumstances, and are in themselves conflicting. The first question which arises is, whether this Court has jurisdiction to make the order asked for.

[515] The Admiralty and Vice-Admiralty jurisdictions are now exercised by this Court as a Colonial Court of Admiralty constituted under the provisions of the Colonial Courts of Admiralty Act, 1890, 53 and 54 Vict., c. 27. Section 16, cl. (3), of that Act enacts : "If, on the commencement of this Act in any British possession, rules of Court have not been approved by Her Majesty in pursuance of this Act, the rules in force at such commencement under the Vice-Admiralty Courts Act, 1863, and in India the rules in force at such commencement regulating the respective Vice-Admiralty Courts or Courts of Admiralty in India, including any rules made with reference to proceedings instituted on behalf of Her Majesty's ships, shall, so far as applicable, have effect in the Colonial Court or Courts of Admiralty of such possession and in any Vice-Admiralty Court established under this Act in that possession, as rules of Court under this Act, and may be revoked and varied accordingly . . . . . . So far as any such rules are inapplicable or do not extend, the rules of Court for the exercise by a Court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same Court of the jurisdiction conferred by this Act."

(1) Swabey 153.

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As no rules have yet been passed by this Court under the Colonial Courts of Admiralty Act, it becomes necessary to enquire by what rules the practice of this Court in its Vice-Admiralty jurisdiction was regulated at the commencement of that Act. This was the subject of enquiry in *In the matter of the Ship "Fannie Skolfield"* (1), and the result is thus stated at p. 338 of the report: "It is necessary, therefore, to examine the several enactments and rules affecting the question. The Act 2 and 3 Will. IV, c. 51, empowered the King in Council to make rules to govern the practice of Vice-Admiralty Courts abroad. The rules relied upon in support of the present application were issued under that Act, and no doubt became binding upon those who then exercised the Vice-Admiralty jurisdiction now vested in the Court. And I believe the usual practice in the days of the Supreme Court was to exercise the Vice-Admiralty jurisdiction conferred by the Commissions from time to time issued, rather than the Admiralty jurisdiction **[516]** given by the Supreme Court Charter, just as this Court has followed a similar course. The Act 24 and 25 Vict., c. 104, under which the High Courts were founded, after providing for the transfer of the old jurisdiction, enacted (s. 11): "That, amongst other things, orders in Council applicable to the Supreme Court or its Judges should apply to the High Court and its Judges so far as might be consistent with the Act and the Letters Patent to be issued and subject to the legislative powers of the Governor-General in Council. The first Charter gave to the High Court the jurisdiction, Admiralty and Vice-Admiralty, hitherto belonging to the Supreme Court or any Judge thereof. The second Charter, s. 32, continued this jurisdiction, and, in s. 37, enacted that the Court should have power by rule to regulate its procedure in civil cases, including cases in its Admiralty and Vice-Admiralty jurisdiction, with a proviso that the Court shall be guided, as far as possible, by the Code of Civil Procedure, then Act VIII of 1859, an Act which did not apply *proprio vigore* to the High Court. Under this clause the Court, on the 4th April 1866, issued rules, of which several apply to Admiralty matters." Then, after considering the rules of this Court passed under the second charter, the learned Judge proceeds: "The effect of those rules seems to me to have been to put an end to the operation in this Court of the Privy Council Rules, except in the cases in which they were expressly kept alive, that is to say, suits *in rem*, in which there is no appearance, and other matters to which the Procedure Code cannot be applied."

The Civil Procedure Code itself contains no provision for the consolidation of suits. It appears, however, that applications have been made to consolidate suits instituted under the Code. In a case in which the parties to the suits sought to be consolidated were different, and the subject-matter of the suits was also different, the Court declined to make any order: *Soorendro Pershad Dobey* v. *Nundun Misser* (2). In another case in which the parties to the suits sought to be consolidated where the same, and the subject-matter of the suits was also the same, consolidation was allowed: *Peacock* v. *Byjnath* (3). Four other **[517]** cases were referred to (one reported and three unreported) as cases in which applications had been made to consolidate suits. In the reported case, *Nehal Singh* v. *Ali Ahmed* (4), no authority was cited, and the Court proceeded on the ground of expediency. In two of the unreported cases the facts appear to show that the orders were substantially consent orders,

(1) 17 C. 337.
(2) 21 W.R. 196.
(3) 10 C. 58.
(4) 15 W. R. 110.

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though not expressed to be so. In the other case the application was not for consolidation at all.

There is no procedure applicable to such a matter prescribed by the Rules and Regulations made in pursuance of 2 and 3 Will. IV, c. 51. Under these circumstances the only course left is to follow the analogy of the practice of the Court of Admiralty in England.

No doubt, it was the earlier practice to compel actions to be consolidated on the application of the defendants against the consent of the plaintiffs, and also on the application of the plaintiffs against the consent of the defendants. The later practice, however, has been not to grant consolidation on the application of the defendant without the consent of the several plaintiffs, or on the application of the plaintiffs if the defendant objected. See Williams' and Bruce's Admiralty Practice, p. 387.

The authorities for the earlier practice are the cases of *The* "*William Hutt*" (1) and *The* "*Melpomene*" (2). The authorities for the later practice are the cases of *The* "*Jacob Landstrom*" (3) and *The* "*Pasithea*" (4). In the case of the *The* "*Jacob Landstrom*" (3) Sir Robert Phillimore says at p. 193 of the report: "I perceive that in the case of *The* "*Melpomene*" (2) decided by myself in 1873, I ordered two cases to be consolidated when the application was on behalf of the plaintiffs and resisted by the defendants; nevertheless, the more recent practice of the Court has been not to force consolidation when the parties object to it and maintain that their interests are different. But although in these case the Court has not compelled consolidation, it has always held it to be in its power to condemn the party refusing to consolidate in costs.

[518] In the case of *The* "*Pasithea*" (4), the plaintiffs objecting to the consolidation, no order was made. The action was heard, and it would seem that the parties appeared separately. The Judge awarded £50 to the owner, master, and crew of the "Prince of Wales" and £600 to the owner, master, and crew of the "Harwich," and ordered that the defendants should only pay one set of costs to be apportioned between the plaintiffs according to the amount of their respective bills of costs, observing that the apportionment of their costs according to the amount of the taxed costs of the plaintiffs, as directed in a previous case, the case of *The* "*Sarah*" (5), had been found to be inconvenient in practice.

Now that being the clear practice as at present obtaining in the Court of Admiralty in England, I ought, I think, on the present occasion, to adopt that practice. The facts and circumstances on which the various actions are based, though not the same, are, in my opinion, closely connected. Therefore, following the English practice, I shall make this order: The various actions will be put down so as to be heard one after the other successively, and in this connection I desire it to be distinctly understood that, should it appear at the hearing that the application for consolidation was resisted without sufficient reason, the various promovents will be liable to be subjected to an order allowing them only one set of costs as against the impugnants. There is no question that even though there should be separate hearings, much may be done to lessen the costs. For instance, I see no reason why, in the matter of discovery, there should not be only one affidavit of documents on behalf of the impugnants, nor why the same evidence should be gone overthree times.

(1) Lush. 25. (2) L. R. 4 Ad. and E. 130. (3) L. R. 4 P. D. 191.
(4) L. R. 5 P. D. 5. (5) L.R. 3 P. D. 42.

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I make no order as to these matters, but I desire that they may be considered by the parties as matters likely to affect the ultimate decision on the question of costs.

The question of costs of the present application will be reserved.

[*Note*—It appears from a recent case that the Court of Admiralty in England has reverted to the old practice of allowing actions to be consolidated whenever it may appear to be convenient [519] to do so, without regard to the consent of the parties. *In re The Strathgarry* (1).

Attorney for the " Falls of Ettrick : " Mr. *Carruthers.*
Attorneys for the " Resolute : " Messrs. *Sanderson & Co.*
Attorneys for the " Warren Hastings : " Messrs. *Morgan & Co.*
Attorney for the " Chusan : " Mr. *N. Watkins.*

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22 C. 519 (P.C.) = 22 I. A. 12 = 6 Sar. P. C. J. 564.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Shand and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

CHOTEY NARAIN SINGH (*Defendant*) *v.* RATAN KOER (*Plaintiff*). KARORPATI NARAIN SINGH AND ANOTHER (*Defendants*) *v.* RATAN KOER (*Plaintiff*). [22nd, 23rd November and 8th December, 1894.]

Evidence—Probabilities—Execution of will.

The fact of the execution of a will was disputed by a testator's relations. They impugned the will mainly on the theory of the improbability of its having been executed by him under the circumstances existing at the time, and in the presence of the witnesses alleged to have attested it. They admitted his intention to execute such a will, but contended that, having long deferred the execution, he had died without having effected it.

To outweigh the strong and satisfactory evidence upon which the affirmative of due execution rested, it would have been necessary that the improbability should have been cogent, and clearly made out. But, in their Lordship's opinion, it was neither the one nor the other, and was based on an exaggerated view. The suggested inferences against the will were not borne out ; and, on the other hand, the testimony in support of it was good. The judgment of the High Court, maintaining the will, was affirmed.

[F., 36 A. 93 (98) (P.C.) = 19 C.L.J. 165 = 18 C. W. N, 521 = 26 M.L.J. 153 = 16 Bom. L.R. 141 = 16 O. C. 386 = 22 Ind. Cas. 103 (106); R., 27 B. 626 (638).]

APPEALS from a decree (1st September 1891), reversing a decree (16th February 1891) of the District Judge of Gaya.

The respondent on the 7th April 1890 petitioned the District Court of Gaya under the Probate and Administration Act (V of 1881) for probate of a will of the 23rd March 1890, alleged to have been made on that date by her grandfather, Ram Bahadur Singh, Raja of Tikari, who died on the 31st of that month. She [520] asked for letters of administration with the will annexed to be granted to her as residuary legatee, and filed the will. She asked also for " khas itlanama," or special citation, to be served on the present appellants. The property, mainly ancestral, was valued at eleven lakhs.

The will was in favour of the respondent, the only daughter of the Raja's deceased son, Narain Singh, settling the property upon her. The appellants in both suits were described as collateral relations of the Raja.

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(1) Weekly Notes, March 2, 1895, p. 42.

In the first suit, Chotey Narain Singh was a minor son of Kanhia Dyal Singh, and alleged himself to be the nearest *gotra* and heir. Karorpati Narain and Kamolapati Narain alleged themselves to be heirs, as being great-grandsons of the brother of the late Raja. Each of these filed his caveat, and then, within a few days, filed his petition, opposing the grant of probate, on the ground that the will had not been executed by the late Raja, and that the signature was forged.

In accordance with ss. 73 and 83 of Act V of 1881 the petitioner for probate was made plaintiff, and the objectors to the grant were made defendants—Chotey Narain in the first suit and the others in the second. The issue was as to the actual execution by the Raja. The attesting witnesses, nine out of ten, were examined, and others also. At the hearing it was admitted that the Raja had for years had the intention of making a will under which his estate should go to his grand-daughter, who, by Hindu law, would not have been his heiress. The only question on the present appeal was whether he carried out that intention before his departure from his residence, or, having, as he had previously, delayed in the matter, had died without having given effect to it.

Mr. *R. B. Finlay*, Q.C., and Mr. *R. V. Doyne*, appeared for the appellant in the first appeal.

Mr. *J. Graham*, Q.C., and Mr. *J. H. A. Branson*, for the appellants in the other.

Mr. *R. B. Finlay*, Q.C., and Mr. *J. Graham*, Q.C., were heard.

Counsel for the respondents, Sir *R. Webster*, Q.C., Sir *E. Clarke*, Q. C., Mr. *J. T. Woodroffe*, and Mr. *C. W. Arathoon*, were not called upon.

JUDGMENT.

[521] Afterwards, on the 8th December, their Lordships' judgment was delivered by

LORD WATSON.—These appeals raise the same question in regard to the right of succession to the extensive estates of the late Raja Ran Bahadur Singh, of Tikari, in the district of Gaya, who died on the 31st March 1890. For several years before his death the Raja had been a widower. A son, the sole offspring of his marriage, had died leaving a widow and a daughter, who is the respondent in both appeals.

Upon the 2nd April 1890, two days after the decease of her grandfather, the respondent presented an application to the District Judge of Gaya, setting forth that the deceased had on the 23rd March immediately preceding executed a will in her favour, in respect of all his moveable and immoveable properties; and, on the following day, the alleged will, which is the subject of the present controversy, was produced in Court at Gaya.

On the 7th April 1890, the respondent filed an application to the same Court for letters of administration with the will annexed. The granting of probate of the will was resisted by the appellants, who were first cousins, twice removed, of the Raja. They have, throughout this litigation, been recognized as his heirs *ab intestato*; and the ground of their objection to the respondent's application was that, in order to defeat their title, " Babu Maha Singh and Moonshi Sajiwan Lal, and other principal servants of the late Raja have, fraudulently and with a dishonest motive, set up a false and fabricated document purporting to be the will of the aforesaid deceased Raja Ran Bahadur Singh, and have caused the said Ratan Koer (*i.e.*, the respondent) to apply for probate of the alleged will."

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Two issues were adjusted for the trial of the cause. The second, to which the argument of the appellant's counsel was confined, is in these terms: "Whether the will, dated 23rd March last, propounded by the plaintiff, was duly executed by the late Raja Ran Bahadur Singh, of Tikari, and is genuine?" That issue was answered in the negative by the learned Judge of the District Court; and, on appeal to the High Court, his judgment was reversed by Petheram, C.J., and Beverley, J. The only [522] question raised by the issue, upon which the Courts below came to opposite conclusions, is one of fact; and it may not be out of place to notice that the District Judge had not, in this case, the advantage, which he frequently possesses, of having seen the demeanour of the witnesses, the bulk of the evidence having been taken either on commission or before his predecessor.

There are some facts in the case which are not in dispute; and it may be convenient to advert to some of these before dealing with matters of controversy. The most important of them is thus stated by the District Judge: "As to the intention of Raja Ran Bahadur to make such a will as is propounded there can be no possible doubt." In pursuance of that intention, the Raja had a draft will prepared in the year 1885, and revised by eminent counsel, which settled his entire estates upon his grand-daughter and her heirs, certain villages (which were not specified in the draft) being assigned to her mother for maintenance. At that time the respondent was a minor; and it is common ground that the Raja kept the draft by him unexecuted, at his residence in Tikari, until the month of March 1890, when the respondent attained majority. She, her husband, and her mother lived in family with the Raja.

In the beginning of March 1890 the Raja was residing at Tikari. He remained there until the afternoon of the 23rd, when he went to Gaya; and on the 30th of the month he left Gaya, and went to Calcutta, where he died at 9-30 P.M. on the following day. His right to the rank of Raja had recently been recognized by the Government, but the *khillat*, or ceremony of installation, had not yet taken place. It does not appear that the precise date was fixed, but it had been arranged that a durbar was to be held at Tikari, and the Raja was looking forward to that occasion with much interest. When he left Tikari for the last time, his professed object in going to Gaya was to procure medical advice for his grandson-in-law, who accompanied him; and his visit to Calcutta was apparently prompted by the hope of there persuading the Lieutenant-Governor to preside, in person, at the approaching durbar. It is evident that the death of the Raja was unexpected, and that, at the time when he left home, or [523] indeed, until the afternoon of the 31st March, he had no suspicion that his end was so near.

The outline of the case disclosed in the respondent's evidence, with respect to the preparation and execution of the will propounded by her, is as follows: One Mahomed Fakhruddin, who then lived at Patna, went to Tikari on the 7th March 1890 during the festival of the Holi by the Raja's invitation. It is not disputed that he was the pleader employed by the Raja in 1885 to prepare the draft submitted to counsel. After the festival was over, on the afternoon of the 8th March, he was asked by the Raja to make some alterations upon an Urdu translation of the revised draft of 1885, which he did under the Raja's directions. These innovations did not affect the substance of the document. They mainly consisted in altering the age of the respondent from 14 years or thereabouts to

18 years and 6 months, in deleting the appointment of an executor to administer the estates until she should attain majority, and in supplying the remuneration of the *mouzahs* which were to be assigned for maintenance to her mother. The altered draft was retained by the Raja; and, on the 10th March, Fakhruddin returned to Patna.

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The next incident relating to the will is said to have occurred on Saturday, the 22nd March, when Dil Narain, a *mukhtar* employed by the Raja, came from Sahebgunge, which is a suburb of Gaya, to Tikari, in order to consult his employer with regard to the compromise of a suit. On that day the Raja gave him the amended draft prepared on the 8th by Fakhruddin, and instructed him to write out a fair copy. Dil Narain completed his task the same night, and next morning took the draft and the copy which he had made to the *shishmehal*, where he found the Raja sitting, attended by a number of his retainers. The copy had not been previously compared, and, in the presence and hearing of the Raja, Dil Narain read it aloud, whilst Kali Churn followed him with the draft. The Raja then appended his signature and seal to the document; and, at his request, ten persons, including Dil Narain and Kali Churn, attested its execution. With the exception of Kali Churn, the attesting witnesses were all in the service of the Raja. They were not summoned for the [524] purpose of witnessing the execution of the will, but were selected by the Raja from the persons who happened to be in attendance. When the execution of the will was completed, the Raja went to the zenana, taking with him the instrument, which he then delivered to the respondent, and explained to her at the same time that its effect would be to make her the *malik* of the Raj at his death.

The account thus given by the respondent of what took place on the 8th, 22nd and 23rd March 1890, with reference to the drafting, extending and execution of the will which she propounds, is supported by a large and consistent body of evidence. The oral testimony adduced by her includes the depositions of every person alive who had taken a share, on these three days, in the preparation or execution of the will, and of many other witnesses who swear that they were present, and saw and heard what was done and said on one or more of these occasions. That evidence was very fully submitted and commented upon in the elaborate argument of the appellant's counsel; and their Lordships, having examined it for themselves, are satisfied that it does not contain any discrepancies, or other internal features calculated to suggest doubts as to its credibility. It may be open to the observation, which is often applicable to evidence, undoubtedly genuine, that the testimony of some witnesses ought to be received with greater caution than that of others; but, making due allowance for that circumstance, the evidence taken as a whole appears to their Lordships to be, upon every material point, consistent, and consistent in this sense, that it does not raise a suspicion that the witnesses are all telling the same concocted story.

The appellants have adduced no counter evidence directly bearing upon the occurrences of the 8th, 22nd and 23rd March spoken to by the witnesses for the respondent. The theory which they maintain in regard to the making of the will is shortly this: That the Raja, when he went to Calcutta on the 30th March, had not executed any will; that his deliberate intention was not to execute a will until the ceremony of the *khillat* took place; and that the will now propounded was fabricated by Maha Singh and Sajiwan Lal, two of the Raja's [525] confidential servants, with the assistance of others, between the

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morning of the 1st April, when news of the Raja's death reached Tikari, and the afternoon of the 3rd April, when the forged document was produced in Court.

In these circumstances it became absolutely necessary for the appellants to assert and show that the whole evidence of the respondent relating to the execution of the will in question is a tissue of falsehoods. In their argument addressed to this Board the appellants, whilst they maintained that the evidence as to what took place on the 22nd and 23rd March was a mass of perjury, did not extend the same imputation to the events of the 8th March. They contented themselves with saying that they did not admit that these events did actually occur. Their Lordships can only understand that contention to mean that, whilst they do not impute perjury to Fakhruddin, they maintain that this account of his altering the draft of 1885, in accordance with instructions from the Raja, is not sufficiently proved. To that conclusion their Lordships are unable to assent. It is nowhere disputed that the alterations upon the draft are in the handwriting of Fakhruddin; they contain internal evidence of the date about which they were made; and there is not a scintilla of proof tending to show that Fakhruddin ever had an opportunity of making them, after his visit to the Raja in the beginning of March 1890.

On the assumption that Fakhruddin did, in point of fact, alter the draft on the 8th of March as he alleges, the appellants argued that the circumstance was immaterial, because the Raja, at that time, entertained the intention, which he never departed from, of executing no will until a durbar was held for his investiture. If it were proved that the Raja held and acted upon the intention thus attributed to him, the alteration of the draft would certainly be immaterial. If that be not proved, the fact that the alterations were made, and the tenor of these alterations, would appear to their Lordships to indicate that the Raja contemplated the early execution of his will because his grand-daughter had attained her majority.

In the absence of direct oral testimony to support their case, the appellants' impeachment of the will, and of the evidence **[526]** by which it is supported, was rested by their counsel upon three grounds. The first of these was the extreme improbability of the Raja having executed his will, in the presence and with the testamentary attestation of his servants and inferiors. It was strenuously urged, as matter of notoriety (for there is no evidence upon the subject) that a Hindu gentleman of his rank, unless compelled by circumstances of sheer necessity, such as the fear of immediate dissolution, would never dream of proceeding to make his last will, without inviting the attendance of the *Rais*, or notables of the district. The second of these grounds was that, after the date when the alleged will is said to have been executed, the tenor of the Raja's communications with his friends and acquaintances shewed that he was still intestate; and, the third, that it was the deliberate purpose of the Raja to postpone the execution of his will until the ceremony of the *khillat* was performed.

There appears to be no warrant whatever for affirming the existence of the second and third of these grounds, unless they be matters of fair inference from evidence led on both sides, as to what the Raja either said, or left unsaid, with regard to his will, during the period which elapsed between its alleged completion on the morning of the 23rd and his death on the evening of the 31st March. Their Lordships think it

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necessary to examine that evidence, which the appellants' counsel admitted to be conflicting. Both parties to this appeal are agreed that the Raja intended to make a will before he died, ousting the succession of his heirs, and settling his whole estates upon the respondent and her mother, in terms of the instrument propounded. It is clear, on the one hand, that statements made by the Raja, after the date of that document, shewing his belief that he had not yet barred the succession of his legal heirs, and did not mean to do so before the holding of the durbar, to which he was looking forward with so much concern, would militate strongly against the inference that it had already been formally executed. On the other hand, it is equally clear that statements made by the Raja, during the same period, amounting to an acknowledgment that he had executed the document, and had delivered it as a completed and effectual [527] instrument to the respondent, would afford a strong corroboration of her oral testimony, which, according to the appellants, is perjured.

There are five witnesses for the respondent whose testimony on this point appears to their Lordships to be of considerable importance: (1) Dr. Hira Lal Dutt, Assistant Surgeon in the employment of the Government at Tikari, who, on the 23rd March, was called in professionally by the Raja, in the course of the day, shortly before his departure for Gaya; (2) Harku Singh, a zemindar and trader of independent means who had an interview with the Raja, at Gaya on the following day; (3) Nund Lal, who has a net income from his zemindari of Rs. 1,800 a year, and about one lakh of rupees embarked in trade, who saw the Raja on the 27th or 28th March; (4) Khoob Lal Singh, a zemindar, having a third share of an estate, which yields an annual income of Rs. 25,000, who conversed with the Raja on the 24th and again on the 30th March; and (5) Abdul Hassan, a barrister-at-law, and registrar of the Presidency Small Cause Court at Calcutta, who had a conversation there with the Raja upon the morning of the 31st March. On each of these occasions, the Raja stated that he had executed his will before leaving Tikari; and upon the first four of them, he added the statement that, after its execution, he had delivered the instrument to the respondent. On the 23rd March he informed Dr. Hira Lal Dutt that the execution took place "on the morning of that day"; and on the 24th March he told Harku Singh that the signing, sealing and attestation of the will took place "yesterday." In his conversation with Abdul Hassan, the Raja made this further statement; after informing the witness that his will had been executed in favour of his grand-daughter, he said that "at the time of the ceremony he would get all the officials to sign it."

There appears to their Lordships to be no reasonable ground for suggesting that there is any ambiguity in the depositions of these witnesses, and no such suggestion was made in the course of the appellants' argument. If true, they establish that the Raja made statements to the effect that he had, before leaving home, formally executed a will in her favour, and had [528] delivered it into the keeping of the respondent. The witnesses are persons of standing and respectability, unconnected with the Raja and his household, and having no interest in the issue of this litigation; and, in the opinion of their Lordships, nothing short of clear and cogent proof can justify the imputation which the appellants did not scruple to cast upon them that, after the death of the Raja, they deliberately consented to perjure themselves, in order to set up a will which they knew to have been forged by his servants.

Several other witnesses were examined with reference to the same point by the respondent; amongst them Dr. John Martin Coates, an

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intimate friend of the deceased. He occupies the proud position of being the only witness for the respondent who is admitted by the appellants to be *omni suspicione major.* He attended the Raja twice on the 31st March, at 11 A.M. and again at 6 P.M. On neither of these occasions did the Raja make any reference to his will. On his first visit, the patient, though seriously unwell, was apparently inclined to talk. He answered questions about his illness, and had spoken first about his own dog, and then about the doctor's children, of whom he was fond. when the witness says, "finding that his speaking was with much difficulty and weakened, I forbade him to speak any more." On the second visit, the patient was dull, fast sinking, and silent. He merely sat up, and allowed the doctor "to examine him and listen to his lungs." Having regard to the intimacy which subsisted between him and the deceased, it was very proper that the respondent should examine Dr. Coates. His evidence shows that, upon his first visit. the Raja had not the opportunity, and, upon his second, had not the physical ability, to refer to the execution of a will. It cannot, in their Lordships' opinion, give the least colour to the inference suggested by the appellants that the Raja cannot have discussed the subject on the occasions deponed to by other witnesses, when he had the ability and the opportunity to do so. As to the remaining witnesses upon this point, the appellants have, in their cross-examination, laid some foundation for the suggestion, that the language which the Raja addressed to them was ambiguous and might be taken to signify, either that the Raja had **[529]** executed a will, or had so far prepared a will that it was ready for execution.

To turn now to the evidence of the appellants. The witnesses upon whom they rely are six in number, being (1) Frank Hunter Barrow, Esq., Collector of Gaya; (2) Mahomed Wazir Ali Khan, a medical practitioner at Gaya; (3) Dr. Binode Krishna Bose, assistant surgeon at Gaya; (4) Dip Narain Singh, zemindar and cultivator in district Gaya; (5) Dasrath Singh, following the same occupation; and (6) Budri Narain Singh, a zemindar and cultivator in district Patna.

Mr. Barrow paid what was apparently an official visit to Tikari on the 23rd March. He was met on his arrival by the deceased, whom he visited, for a short period, on the same day. That was the last occasion on which he saw the Raja. He does not profess to have been an intimate acquaintance, and he does not recollect the topics of their conversation; but, to the best of his belief, the subject of the Raja's will was not referred to. Mahomed Wazir Ali Khan saw the Raja professionally three times during his stay at Gaya, and on none of these occasions did the Raja make mention of his will. Dr. Binode Krishna Bose attended the Raja professionally at Gaya on five or six occasions, but no reference was made to the will. Dip Narain Singh saw the Raja at Gaya on the 25th March, when nothing was said about the will; and Dasrath Singh saw him on the 25th and 30th, but heard nothing about the will.

Their Lordships see no reason to doubt that the statements made by these witnesses may be true; but, assuming them to be so, they do not warrant the inference that the statements made by the respondent's witnesses are false. They cannot assume that the Raja must necessarily have introduced the subject of his will into his conversation with every friend or acquaintance whom he happened to meet; and that he cannot possibly have used the language attributed to him by the respondent's witnesses because he did not mention the subject to Dr. Coates, or to the witnesses called by the appellants.

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These observations do not apply to the testimony of the appellant's witness, Budri Narain Singh, which is deserving of special notice. He deposes that, on the 24th of March, he went [530] to see the Raja at Gaya, and had a conversation with him; that no mention was made of a will, and that the Raja said: "If my grand-daughter had been a son, then my heart would have been glad. There is a curse on the Raj. After me my kinsmen will sit on the *guddi.*" That is a strange assertion. If it were true, it would prove that the Raja had determined not to make a will in favour of the respondent, and had resolved to allow his Raj to devolve upon his legal heirs. That is in entire contradiction to the case maintained by the appellants here, as well as in the Courts below, which is that the deceased fully intended, from 1885 till the day of his death, to devise his estates by will to the respondent; that he had purposely delayed the execution of the will until he was formally invested with the dignity of Raja; and that his intention was frustrated by his sudden and unexpected death.

In that state of the evidence, their Lordships are unable to resist the conviction that on several occasions, after the morning of the 23rd March, the Raja made statements clearly evidencing his belief that he had duly executed the will in question, and the fact that he had delivered it as a completed instrument to his grand-daughter. In their opinion, the second ground relied on by the appellants is without foundation in fact

The third ground, which assumes the settled intention of the Raja to have been that he would execute no will before the ceremony of the *khillat*, appears to their Lordships to be equally destitute of evidence to support it. In the appellants' evidence, there is not a single sentence bearing upon it. Seven of the respondent's witnesses testify to statements made by the Raja, on the morning of the 23rd March and subsequently, explaining what he meant to do on the occasion of the *khillat*. Two of them are testamentary witnesses; and their statement is, that after the will had been signed and sealed by the deceased, and attested in its present form, the Raja, before taking it to the zenana, said that, at the time of the *khillat*, when the officials were assembled, he would cause them to attest it also. The rest of these witnesses were not present at the execution of the will; but to four of them he made practically the same statement with regard to a written or executed will, which he had delivered as a completed instrument [531] to his grand-daughter, in order to secure her right of succession; and the deposition of the only other witness is that the Raja said: "I have a great wish to have the will which I have executed in favour of my daughter in-law and my grand-daughter signed in that assembly (jalsa) by the Lieutenant-Governor and other officials." That is the whole evidence on the subject which is to be found within the four corners of the record; and it is simply impossible, upon any reasonable or legitimate construction, to derive from it the conclusion that the Raja, though intending to make, had not yet made a will, and that he meant to delay its execution until a durbar was held.

The whole argument addressed to their Lordships for the appellants comes, therefore, to depend upon their theory of improbability, which was accepted by the District Judge and rejected by the High Court. Laying out of view that theory, and the effect which ought to be given to it, the case of the respondent appears to their Lordships to be clearly and satisfactorily proved. The settled intention of the deceased to make a will in the precise terms of the instrument propounded

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is beyond dispute; there is a large and consistent body of testimony evidencing the preparation of the draft will, the making of a clean copy, the signing and sealing of that copy by the testator, and its attestation by the subscribing witnesses. There is consistent and uncontradicted testimony that the testator, as soon as these acts were completed, delivered the instrument, as a valid and legally executed instrument, to his legatee; and there is also evidence to the effect that he subsequently acknowledged that all these acts had been performed.

The theory of improbability remains to be considered; and the first observation which their Lordships have to make is, that in order to prevail against such evidence as has been adduced by the respondent in this case, an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility. To give effect to the argument pressed upon this Board by the appellants, which seems to have found favour in the Court of first instance, would be equivalent to holding that the will of a Hindu gentleman, attested by his own servants and dependants, must be held to be invalid, unless it is **[532]** shown that the testator, at the time assigned for its execution, was placed in such circumstances that he could not secure the attendance of of persons of a higher rank. That is a proposition which verges too closely on the absurd to be seriously entertained. There may be cases in which attestation by servants only is an important element to be taken into account in considering whether a will has been validly executed—cases, for example, in which there is reasonable ground for suspicion that the will is not the voluntary act of the testator, but has been procured by the undue influence of members of his household. This case does not, in the opinion of their Lordships, belong to that class. In their opinion, there is nothing either unreasonable or improbable in the supposition that the deceased Raja executed a will attested by his servants, for the purpose of securing the succession of his grand-daughter, entertaining, at the same time, the intention of having the will further attested by the leading officials present at the durbar, and of then publicly proclaiming the arrangements which he had already made with respect to the devolution of his Raj.

Their Lordships, for these reasons, have no hesitation in accepting the conclusion at which the High Court arrived, and in differing from the District Judge, who appears to them to have proceeded upon an exaggerated view of the improbabilities of the respondent's case. They will humbly advise Her Majesty in both appeals to affirm the judgment of the High Court. The appellants must bear the costs of these appeals.

Appeals dismissed.

Solicitors for the appellant Chotey Narain Singh: Messrs. *T. L. Wilson & Co.*

Solicitor for the appellants, Karorpati Narain Singh and Kamalapati Narain Singh: Mr. *J. F. Watkins.*

Solicitor for the respondent: Mr. *S. G. Stevens.*

C. B.

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PRESENT:

Lords Halsbury, Hobhouse, Shand and Davey, and Sir R. Couch.

[*Consolidated appeals from the High Court at Calcutta.*]

RAM RANJAN CHAKERBATI (*Plaintiff*) v. RAM NARAIN SINGH AND OTHERS (*Defendants*).* [7th November, and 8th December, 1894.]

Evidence—Admissbility of evidence—Presumption arising from facts of permanency of tenancy—Long possession at an unvaried rent.

A zemindar claimed the proprietary right and possession of *mouzas* within the limits of his zemindari, against the tenants, who, by themselves and their predecessors in title, had held the land from before the Decennial Settlement in Bengal, an an unvaried rent having been paid to the zemindar. The first defendant alleged a grant to his ancestor of a *mokurari* tenure by a ghatwal then holding land within the zemindari: the other defendants alleged title as *dar-mokuraridars* under the first. Part of the evidence for the defence consisted of judgments, among which was one of the year 1817, and another of 1843, to which the zemindar's predecessors had not been parties. These had been given in suits brought by the successor of the ghatwal which had been resisted by the first defendants' ancestors, on the ground of their having had fixity of tenure. *Held*, that they could be received as evidence of long anterior possession at a rent, and of the title, on which the defendants now relied, having been openly asserted long ago. Taken with other evidence, they established possession by the defandants at a uniform rent paid to the zemindar, thus leading to the inference that the tenure had been, and still was, of a permanent character.

[Rel. on, 18 C.W.N. 297=18 C.L.J. 277=21 Ind. Cas. 481 (483); R., 25 A. 546=23 A. W.N. 137; 24 B. 591; 25 C. 522 (F.B.); 34 C. 753=5 C.L.J. 583=12 C W.N. 193; 35 C. 701=7 C.L.J. 563=12 C.W.N. 657 ; 5 Bom. L.R. 230 (232) ; 9 C.L.J. 597 =12 C.W.N. 739=4 Ind. Cas. 81 (85)=6 M.L.T. 363; 4 C.W.N. 63; 9 C. W.N. 402 (414) ; 12 C.W.N. 739 (745) ; 17 C.W.N. 1016=15 Ind. Cas. 624 ; 4 Ind. Cas. 626 (629)=86 P.W.R. 1909 ; 7 O.C. 122 (124) ; 23 Ind. Cas. 773 ; Cons., 9 C.W.N. 402 (407); D., 9 C.L.J. 16=13 C.W.N. 217=5 M.L.T. 359=1 Ind. Cas. 572.]

APPEALS from a decree (9th February 1891) of the High Court, affirming, on second appeal, a decree (19th December 1889) of the Court of the Deputy Commissioner of the Sonthal Pergunnas, which affirmed a decree (17th August 1889) of the Sub-Divisional Officer of Jamtara.

These appeals arose out of two suits brought on the 20th December 1884 by the Raja of Hetampur, in Birbhum, the present appellant, who claimed possession of seven *mouzas*, known as *taluk* Sitamarhi, by setting aside, as not existing, the *mokurari* tenure alleged by the first defendant, and supported by twenty-two other defendants, alleging themselves to have *dar-mokurari* rights under the first. These rights had been recognised in their favour in the settlement proceedings of the year 1875, held under the Sonthal Reg. III of 1872.

[534] The title claimed by the appellant was that he, and his predecessor in title, had been possessed as zemindars of the villages in suit, leasing them in *ijara* of which the last *ijara* expired in 1877, the first *ijara* having been made to Digumber Singh in 1806 and renewed from time to time.

The first of the two suits was brought against Ram Narain Singh and Atni Behari Sircar, with twenty-two other sircars, for six *mouzas* out of the seven. All these villages were part of seventeen *mouzas* comprising *taluk* Koroya formerly belonging to the Raja of Nagore, by whom the

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taluk was said to have been sold to the plaintiff's grandfather in 1817. The second suit was brought for the seventh *mouza*, Damdami, against the same first defendant, with whom was joined the occupant of it, Mahomed Bhikam, the latter alleging a *dar-mokurari* under Ram Narain, who claimed to be *mokuraridar* of all. The other defendants claimed to hold under him; so that, as was admitted in the lower appellate Court, upon the title of Ram Narain depended that of all the others. His defence was that his great-grandfather, Bandhu Singh, acquired a *shikmi* or fractional under-tenure in these villages at a fixed rent, from Gambhir Singh who was ghatwal of *taluk* Koroya and who granted a lease in 1777 of five villages to Bandhu Singh at a rent of sicca Rs. 25, and of two more villages in 1778, raising the rent to sicca Rs. 35, and that these villages had been since so held by his ancestors and by him. The defence of the others was that Bandhu Singh, granted their *dar-mokurari* leases to thier ancestors. On Gambhir Singh's side the descents were these: He had a son Digumber Singh, whose son was Haradhan Singh, the father of Durga Pershad singh whose son, Kali Pershad Singh, was living when this suit was heard, bnt was not made a party to it. On the other side, the Bandhu Singh, above-mentioned, had a son, Jugmohun Singh, whose son was one also named Kali Pershad, and this last was the father of Ram Narain Singh.

The question on this appeal was whether, upon evidence legally admissible, the inference had been properly drawn that Ram Narain had succeeded as *mokuraridar*. At the hearing of the suit, he was allowed to put in evidence judgments in suits, of which one was decided in 1817, and the other in 1843; the first having been between Digumber Singh, as ghatwal plaintiff, and [535] Jugmohun Singh, as tenant, defendant, the latter defending his possession on the ground that he held a *mourasi* and *mokurari* or hereditary and fixed tenancy of the seven villages. In the later suit of 1843 Digumber sued, again without success, to enhance the rent upon these villages against Kali Pershad Singh, the father of the present defendant, Ram Narain.

On the 16th September 1875, the Settlement Officer of the Sonthal Pergunnas made an order recognizing Ram Narain as *mokuraridar*, and the other defendants as *dar-mokuraridars*. The present suits, when first heard in the Sub-Division, were held to be barred by limitation under the Sonthal Reg. III of 1872, s. 25, because they had not been brought in due time from the date last mentioned. The suits, however, were remanded by the Deputy Commissioner for hearing on their merits, and were so heard by another Sub-Divisional Officer, who had succeeded the first, and who found, after a searching inquiry, that Gambhir Singh, in 1184 B. S., or 1777 A. D., being then the ghatwal of *taluk* Koroya, had granted the *mokurari* to Bandhu Singh at the rent above stated. On an appeal to the Deputy Commissioner, in which the grounds, amongst others, were that the judgments abovementioned had been erroneously admitted in evidence, this evidence was held to have been rightly received. The District Officer held the first to be the best evidence available of Digumber's having been in 1807 openly claiming to be ghatwal, and of Jugmohun's asserting a permanent tenure; and observed that this was on the part of the plaintiff in that suit setting up a title hostile to that of the zemindar, which the latter would hardly have passed over if Digumber had been only an *ijaradar* for a term of years. That was soon after the Permanent Settlement. The suit of 1843 gave rise to similar inferences. The person now called by the present plaintiff

an *ijaradar* was then openly declaring himself ghatwal, and this, if untrue, would probably have occasioned a cessation of the renewal of such leases to him, according to the view taken in this judgment.

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On an appeal to the High Court a Division Bench, NORRIS and BEVERLEY, JJ., held that they might properly presume the grant of a permanent *mokurari* tenure from long continuous possession at an unvarying rent. This was done in the cases of *Dukhina Mohun* [536] *Roy* v. *Kureemoollah* (1) and *Nidhi Krishna Bose* v. *Nistarini Dasi* (2). The Court observed as to the admissibility of the judgments, to which exception had been taken, that the lower appellate Court had only admitted them as evidence of there having been litigation between the parties thereto at the dates to which they related; to show, in fact, that at those dates the so-called ghatwal was suing the so-called *mokuraridar*, respecting the villages in suit, and that in those suits the parties asserted the same rights that were asserted in this suit. To this extent the Judges held that the prior judgments were admissible, though the zemindar was no party to them. The Court also noticed a contention for the appellant that on the construction of Reg. XXIX of 1814 and Act V of 1859, even supposing that Gambhir Singh was a ghatwal, he had no authority to grant a permanent under-tenure. On this point they referred to the records of two cases, decided by the High Court in 1866, in which it was held that ghatwals in Birbhum, under circumstances very similar to those of the present case, had the power to make permanent grants of portions of their lands to others. The appeal, therefore, failed. The Judges added that the defendants having in possession, probably, for upwards of a century, should not be allowed to be dispossessed upon the case made for the plaintiff. It might be true—indeed it was not denied—that the plaintiff was zemindar of the estate, but before evicting the defendants at his will, when they held for so long a period, he ought to be compelled to prove something more than that he was the zemindar. The defendants claimed to have been in possession before the plaintiff's purchase in 1807, under a person who was admitted to have been in possession at that date. On the other hand, all that the plaintiff alleged, and this he did not even attempt to prove, was that the intermediate holder was a mere *ijaradar*, and, as such, incompetent to create a permanent under-tenure. The appeals were dismissed.

On this appeal,—

Mr. *R. V. Doyne*, for the appellant, argued that the evidence to establish the defendants' rights to permanent tenures was [537] insufficient to outweigh the *prima facie* case made by the plaintiff as zemindar, the judgments used as evidence for the defence having been inadmissible. The position of the plaintiff as zemindar was not disputed, and the burden of proof was entirely on the defence. Under the authority of *Perhlad Sein* v. *Durga Pershad Tewaree* (3) it was submitted that the zemindar had a *prima facie* title to the gross collections from all the *mouzas* within his zemindari, and that it was incumbent on the descendants setting up the title of intermediate tenures to prove the grant to them, or to their predecessors. The question was whether Ram Narain had, by legal evidence, or at all, proved any such grant to his ancestor as that which he alleged. He had been allowed to give in evidence, notwithstanding objections taken by the plaintiff, judgments delivered in suits to which

(1) 12 W. R. 243. (2) 13 B. L. R. 416=21 W. R. 386.
(3) 12 M I. A. 322 (331)=2 B. L. R. P. C. 111 (134).

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no one, through whom the plaintiff derived his zemindari title, had been a party. The result at which the Courts arrived was that, at the dates of those judgments, Ram Narain's predecessors were successfully asserting the title that he now set up; and that this, with other evidence, went so far as to show that he was entitled. But (the law as to the reception of documentary evidence being the same in India as here) the first objection was that the judgments were not admissible ; and the argument, in the second place, was that the result of Ram Narain's being *mokhuraridar* was not established, even if they were admitted. They did not show that there had been a ghatwal actually with hereditary right. The son and grandson of Digumber Singh had, upon the facts, ceased in later years, and as far back as 1807, to have any connection with Sitamarhi. The *ijaras* which the plaintiff alleged to have been made had been made for short terms, and it was said that, on the expiration of one, another followed. Consequently it was not necessary for the zemindar to take any notice of holdings created by the *ijaradars*, or permitted by them to continue. The zemindar's rights were not affected by them as they could not continue beyond the terms of the current *ijara*. It was submitted that the long possession taken as evidence of a permanent and transferable interest in *Dukhina Mohun Roy* v. *Kureemoollah* (1), and in *Nidhi Krishna Bose* v. *Nistarini Dasi* (2), **[538]** was better established than the *mokurari* lease here alleged, on which depended all the *dar-mokurari* leases also in issue.

The respondents did not appear on this appeal.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD SHAND.—The appellant in this *ex-parte* case, in which two appeals have been consolidated, is the Raja of Hetampur, in Zillah Birbhum, and the zemindar of a *taluk* in the Sonthal Pergunnas called Koroya, within which are comprised the seven *mouzas* now in suit, of which the six *mouzas* embraced in the first suit, and the seventh, called Damdami, the subject of the second suit, form a subordinate *taluk* or estate known as Sitamarhi. The appellant was plaintiff in both suits, which were instituted on the 20th December 1884, against the respective respondents in the first Court, which was that of the Sub-Divisional Officer of Jamtara. Both suits were, after a remand by the Deputy Commissioner of Sonthal Pergunnas, dismissed by the first Court on the 17th August 1889, and on the appellant's appeals in both suits to the Court of the Deputy Commissioner those appeals were dismissed on the 19th December 1889, and his second appeals from the judgments and decrees of the Deputy Commissioner's Court were again dismissed by the High Court at Calcutta on the 9th February 1891.

During the settlement proceedings which took place in the Sonthal Pergunnas in 1875, the appellant claimed settlement with him directly of the seven *mouzas* in question, and a claim was made on behalf of the first respondent, Ram Narain Singh, for settlement with him as *mokuraridar* and on behalf of the other respondents, in the first appeal, as *dar-mokuraridars* of the six *mouzas*, and a similar claim was made on behalf of the respondent in the second appeal, Mahomed Bhikan, as *mokuraridar* of Damdami.

(1) 12 W. R. 243. (2) 13 B.L.R. 416 = 21 W.R. 386.

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The Settlement Officer, finding that the respondents were in possession, and that they had been so for a long period of time, made the settlement with them on the 16th December 1875, and referred the appellant to a regular suit to try the question of right; and about nine years thereafter the present suits were instituted in which the appellant seeks to have it declared that the respondents [539] have no such rights, *mokurari* or *dar-mokurari*, as they maintain, and to have possession given to him.

The appellant founds his claim to the *mouzas* in question, on the fact that they are locally within the zemindari belonging to him—a fact which is not disputed by the respondents; and in his plaint he alleged that his predecessor, and afterwards he himself, held possession of these properties, "by letting out the same in *ijara*. The term of the *ijara* expired in the year 1284." He does not state when or how he or his ancestors acquired right to the zemindari, nor when the term of the *ijara* or *ijaras* commenced.

In defence, besides a plea of limitation, with which it will be unnecessary to deal, the respondents in the first appeal, by their written statement, asserted that from a period before the year 1793, that is before the Decennial Settlement, they and their ancestors had been in possession of the *mouzas* in dispute as a ghatwali tenure, and they maintained that, having possessed respectively under permanent *mokurari* and *dar-mokurari* rights at fixed rents without variation for this long period of time, the appellant had no right to dispossess them. The respondents did not admit that the appellant had granted *ijaras* of the *mouzas* in question, and they alleged that the ancestor of the appellant had acquired the zemindari by purchase after their *mokurari* and *dar-mokurari* rights had been acquired, and while they or their ancestors were in possession under a tenure which could not be defeated by a purchaser of the zemindari. As to the nature of the *mouzas*, they explain that these lands were originally dense jungle, infested with tigers and other wild animals, and that tanks and other improvements having been executed by the efforts and at the expense and with the labour of themselves and their ancestors the ground was now occupied by tenants. In point of fact the lands in question are now the site of seven villages.

The case was originally decided by the Judge of first instance in favour of the respondents on the ground of limitation, in consequence of the proceedings which took place before the Settlement Officer in 1875, and the lapse of time thereafter before the suit was instituted. But this decision was recalled by the Deputy Commissioner, and the case remanded for trial on the merits. Thereafter evidence, oral and documentary, was adduced for both [540] parties, and the decision of all the three Courts, before which the suits came, proceeds on the evidence adduced.

It was not disputed by the counsel for the appellant that the respondents and their ancestors have been in possession for a very long period of time, and there are indeed concurrent findings to this effect. It has been found by the Judge of first instance that the defendant Ram Narain Singh "has held at a fixed *mokurari* rental from before the Permanent Settlement, of Rs. 35 sicca, Government Rs. 37-5-4" (and it is conceded that if the *mokurari* rights be established the *dar-mokurari* rights cannot be successfully challenged), and again in the judgment of the Deputy Commissioner on appeal it is stated that "there has been no serious attempt before me to prove that the rent payable by Ram Narain Singh and his ancestors has been varied since the time of the Permanent Settlement."

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Further, it has been held by these Courts that the appellant has never held *khas* or had immediate possession of the *mouzas* which have for upwards of a century been in the possession of the respondents and their ancestors. The original grant of a *mokurari* right is said by the respondents to have been granted by Gambhir Singh, the ghatwal of *taluk* Koroya, in 1777, by a lease of five villages granted to Bandhu Singh, a direct ancestor of the respondent Ram Narain Singh at a fixed rent of Rs. 25 in perpetuity, and that in 1788 two more villages were added, the rent being raised to sicca Rs. 35.

The ground of judgment by the High Court is that "the Court may very properly presume the grant of a permanent *mokurari* tenure from long continuous possession at an invariable rental," and that "upon the evidence . . . the lower Courts were amply justified in coming to the conclusion that the defendants were in possession long before the date of the plaintiff's purchase, and that it has not been proved that they derived their title from a mere *ijaradar*."

The ground of the appeals by the appellant to this Board, as stated in his case and by his counsel at the Bar, is that this conclusion was reached by taking into view evidence which was not legally admissible, and in particular the evidence of certain decrees granted in proceedings relating to the *mouzas* in question, to [541] which the predecessors of the appellant as zemindars were no parties. These decrees were pronounced in proceedings at the instance of Digambur Singh, the son of Gambhir Singh, by whom the original grant is alleged to have been made, against persons in possession of the *mouzas* in question, predecessors of certain of the respondents, the first dated in 1817 and the second in 1845. In the first of these cases, which originated in 1811, the plaintiff describing himself as owner of the ancestral ghatwali property of the *taluk* Koroya, claimed recovery of possession of the villages now in question from the persons then in possession. The defence was that Gambhir Singh, the father of the plaintiff, Digumber Singh, had granted permanent rights of ghatwali tenure at fixed rents amounting to Rs. 35, and that possession had followed, and the ghatwali duties had been continuously performed, so that possession could not be decreed in the plaintiff's favour. The suit for possession was dismissed, but with leave to bring another suit for assessment of rent, but a decree was therein given for the arrears of rent for the past years, and for future rents at the rate of Rs. 35, which had been "hitherto paid." The subsequent suit for assessment of rent was instituted in 1842. The defence in the former case was repeated. It was maintained that the defendants held under permanent rights of ghatwali tenure at a fixed rent, and for performance of police duties, and that he had fufilled these obligations, and that in such a case no assessment or enhancement of rent could be given ; and this defence was sustained, and the action was dismissed in 1845. It was argued for the appellant that the judgments, of which he now complains, were arrived at by holding certain of the statements of the parties as recorded in the decrees or judgments of 1817 and 1845 as evidence against him in the present suits. Their Lordships do not think this complaint is well founded. It does not appear to their Lordships, that the statements of the parties recited in the decrees in these former cases were accepted as evidence in the present suits.

The Judge of first instance states with reference to these decrees : "I am of opinion that the documents produced by the defendants may be accepted as evidence in this case, as showing ancient possession, and that the

title on which the defendants now rely [542] was openly asserted as early as 1195, B. S. coresponding to 1788 A. D., and at subsequent dates, irrespective of the findings come to in those decrees. The orders passed in these decrees themselves would not be evidence against plaintiff's title, nor can they be considered as proving the defendants' title; but they may be accepted to show ancient possession, and to show that the title was asserted rightly or wrongly many years ago."

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The Judges of the High Court say: "As regards the admissibility of the judgments to which exception has been taken, we observe that the lower appellate Court has only used those judgments as evidence that there was litigation between the parties thereto at the dates to which they relate. It uses those judgments to show that at those dates the so-called *ghatwal* was suing the so-called *mokuraridar* respecting the villages in suit, and that in those suits the parties asserted the same rights which they now assert. To this extent, we think, that the judgments were admissible in evidence, even though the zemindar was no party to them."

It must be observed that by the judgment of 1817 a decree for rent of the *mouzas* now in question was given at the rate of Rs. 35 *per annum*, against the predecessors of the respondents. Their Lordships are of opinion that, although the predecessor of the Raja was no party to that litigation, it was competent to use the judgment as evidence shewing the rent paid for the possession at and prior to that date, now nearly 80 years ago. Taken with the other evidence in the case, the respondents have thus established possession at a uniform rent for so long a period as to lead to the inference that the tenure was and is of a permanent nature.

As the case came finally to be presented for judgment on the evidence, the appellant had really proved nothing beyond his title as zemindar of the *taluk*, within which the villages were situated; which, indeed, was not disputed. This admitted title, no doubt, *prima facie* imposed on the respondents the *onus* of establishing a defence which entitled them to continue in possession. On the other hand, the appellant has given neither statement nor evidence as to when or how his title had its origin. The only information given on the subject is to be found in certain statements in the decrees to the admission of which he himself objected. It is there said that [543] about the year 1807 the appellant's grandfather had become the purchaser of the zemindari at an auction sale, at which date the decree also showed that others were in possession, paying rent to Digumber Singh, who claimed in the character of ghatwal. The only evidence of possession by the appellant related to dates so late as 1868 and 1869, in which years two *pottahs* were granted by the appellant in favour of Durga Pershad Singh of the whole of the *taluk* Koroya at rents of Rs. 550 and Rs. 600. There is no evidence that any rents were asked for or received by him from the possessors of the *mouzas* in question.

The case, therefore, stands in this position, that against the appellant's title to the zemindari, without any evidence of possession of any of the *mouzas* in question, there is proved uninterrupted possession by the respondents and their predecessors from a date before the appellant's ancestor acquired a title; and, indeed, it may be presumed for upwards of a century. The *mouzas* were held throughout that time for the payment of a uniform rent, and there are other considerations to be found in the parol evidence, and specially referred to in the judgment of the Judge of first instance, which support the view that the tenure was ghatwali. Their Lordships

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are satisfied that the presumptions in favour of a fixed and permanent ghatwali tenure, arising from the long-continued possession of the respondents and their predecessors at a uniform rent, are sufficient to overcome the mere title of the appellant as zemindar. There is no reason to presume that by the purchase of the zemindari the appellant's ancestor acquired any right to set aside the rights then existing and exercised by the respondent's predecessors. On the contrary, the presumptions arising from possession are all to a contrary effect. Their Lordships are, therefore, of opinion that the judgments appealed against are well founded, and they will accordingly humbly advise Her Majesty that the appeals ought to be dismissed.

Appeals dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

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22 C. 544.

[544] MATRIMONIAL JURISDICTION.

Before Mr. Justice Sale.

LEDLIE *v.* LEDLIE.* [2nd May, 1895.]

Divorce—Practice—Judicial separation, previous decree for—Dissolution of marriage, Evidence in suit for—Res judicata—Cruelty—Adultery—Identity of parties—Divorce Act (IV of 1869), *s.* 10.

In a suit for dissolution of marriage by reason of the cruelty and adultery of the respondent, the first charge and the marriage of the parties were held to be established by the production of a previous decree for judicial separation on account of cruelty, and by proof of the identity of the parties. *Bland* v. *Bland* (1) followed.

THIS was a suit under s. 10 of the Indian Divorce Act by Alicia Ellen Ledlie, praying for dissolution of her marriage, on the ground of cruelty and adultery on the part of her husband Henry St. Clair Ledlie. The petitioner on the 14th April 1891, in suit No. 4 of 1890, obtained a decree in this Court for a judicial separation. In that suit it was found that there was sufficient evidence of cruelty on the part of her husband to entitle the petitioner to a decree.

Mr. *Caspersz*, for the petitioner.—In England it has been held that a decree for judicial separation does not bar a suit for dissolution of marriage. The decree in the previous suit is conclusive evidence in this. I only propose to offer now evidence of the subsequent adultery and the identity of the parties. *Bland* v. *Bland* (1).

[SALE, J.—The previous decree proves the marriage of the parties and the acts of cruelty. You need only prove the identity of the present parties and give evidence of adultery.]

Evidence was then given accordingly.

JUDGMENT.

SALE, J.—I think the petitioner is entitled to the relief, which she seeks in this suit, and the marriage must be declared to be dissolved. A decree, dated 14th April 1891, was obtained by the petitioner in the former proceedings instituted by her for [545] judicial separation, and is sufficient evidence, in the first place, of the marriage of the parties; and, in the

* Suit No. 6 of 1895.

(1) 35 L.J. P. and M. 104.

second place, of the cruelty, on which the decree is founded. There is further evidence now of the identity of the parties to the present proceedings, and, further, of the fact that the respondent is now living in adultery with a woman, who is not the petitioner. Under these circumstances the petitioner has sufficiently made out a case for dissolution of marriage. There must be a decree *nisi* for dissolution of the marriage, with costs to be taxed on scale No. 1.

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Attorneys for the petitioner: Messrs. *Orr, Robertson & Burton.*

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22 C. 545.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

JUGUL KISHORI CHOWDHURANI, MINOR, REPRESENTED BY HER GUARDIAN, PEARY CHURN SARKAR AND ANOTHER (*Defendants*) v. ANUNDA LAL CHOWDHURI AND ANOTHER (*Plaintiffs*).*
[7th March, 1895.]

Specific performance—Suit for specific performance of a contract against a minor—Contract entered into by a guardian with the sanction of the Court—Act XL of 1858, *s.* 18—*Guardians and Wards Act (VIII of* 1890), *s.* 31.

In a suit to enforce specific performance of a contract against a minor, entered into by a guardian appointed under Act XL of 1858 with the sanction of the Court, it was not shown that the contract was for the benefit of the minor. *Held*, that a decree for specific performance of a contract should not be made against the defendant while an infant.

Flight v *Bolland* (1) and *Sikher Chund* v. *Dulputty Singh* (2) referred to.

Held also, that although the jurisdiction to decree specific performance is discretionary, it must be judicially exercised, and no Court would, even if it could, make a decree for the specific performance of a contract, unless the contract was shown to be for the infant's benefit.

[F., 26 B. 626=3 Bom. L. R. 898 (900); R., 34 C. 163=4 C.L.J. 431=11 C.W.N. 34 =1 M.L.T. 360; 4 Bom. L.R. 587 (603); 17 Ind. Cas. 497 (499)=23 M.L.J. 610 (615)=(1912) M.W.N. 1188 (1191); Cons., 11 C.W.N. 207.]

[546] THIS appeal arose out of an action brought by the plaintiffs to enforce specific performance of a contract against a minor, entered into by her guardian appointed under Act XL of 1858 with the sanction of the Court. The plaintiffs' allegation was that one Kishendra Narayan Chowdhuri died, leaving certain immoveable properties, and his widow, who was a minor, became entitled to and held possession of those properties. The father of the widow obtained a certificate under Act XL of 1858, and became the guardian of the person and property of the minor. In order to pay off debts contracted by the deceased husband of the minor, as well as to meet the expenses of a law suit brought by the mother-in-law against the minor, the guardian made a contract with the plaintiffs agreeing to grant them a *putni* settlement in respect of three *mehals* belonging to the minor, and sanction for the lease was obtained from the District Judge. The plaintiffs further alleged that a portion of the consideration money agreed to be paid was received by the guardian, but notwithstanding this he, without their knowledge, and in violation of

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* Appeal from Appellate Decree No. 2139 of 1893 against the decree of J. F. Bradbury, Esq., District Judge of Pubna and Bogra, dated the 27th of September 1893, affirming the decree of Babu Shambhu Chandra Nag, Additional Subordinate Judge of Pubna and Bogra, dated the 15th of September 1892.

(1) 4 Russ. 298. (2) 5 C. 363.

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the contract, granted a *putni* of the said three *mehals* to defendants Nos. 2 and 3.

The defendants Nos. 2 and 3 pleaded that the plaintiffs had no cause of action against them; that the guardian of the minor did not enter into any contract with the plaintiffs, but, on the other hand, in the month of May 1891, he agreed to grant them a *putni* of the disputed properties at an annual *jama* of Rs. 497-4-8, and for a consideration of Rs. 2,200, and obtained the sanction of the Judge to this arrangement; and that, after this contract, the said guardian, in collusion with the plaintiffs, agreed to grant a lease to them for a small consideration, which he could not legally do.

On behalf of the minor defendant, amongst other matters, it was pleaded that the guardian had no power to do any act prejudicial to her interest, and that she could not be bound by any such act.

The Subordinate Judge decreed the suit of the plaintiffs, holding that the contract was complete, and it was not prejudicial to the interests of the minor. On appeal, the District Judge confirmed the judgment of the Subordinate Judge.

From this decision the defendants appealed to the High Court.

[547] Dr. *Rash Behari Ghose* and Babu *Kisory Lal Sarkar*, for the appellants.

Babu *Sreenath Das* and Babu *Saroda Churn Mitter*, for the respondents.

Dr. *Rash Behari Ghose.*—The Court below was wrong in allowing a decree for the specific performance of a contract against the minor. It has been held in the case of *Flight* v. *Bolland*(1) that an infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. The remedy not being mutual, a Court cannot pass a decree for specific performance of a contract against a minor. Want of mutuality has always been deemed a sufficient ground for refusing specific performance of a contract. The mere fact that the guardian, with the sanction of the Judge, has entered into a contract with a third party, does not affect the position of the minor. In the case of *Sikher Chund* v. *Dulputty Singh* (2), at p. 370 of the report, Prinsep, J., said: "The fact that a guardian may have improperly sold property belonging to his ward, and may have embodied this transaction in a written instrument, cannot, in my opinion, affect the position of a minor seeking to recover that property, merely because a written instrument was executed. That instrument was between the guardian and the third party. If the guardian had exceeded his authority, the instrument is not the act of the minor, and it would not be incumbent on him to sue to set it aside, as in the case of one who has himself executed an instrument the validity of which he impugns." The guardian has acted improperly in this case, and the minor is not bound by his act, notwithstanding a sanction from the Judge was obtained. The Court below has not found that the contract was for the benefit and advantage of the minor, and consequently a decree for specific performance ought not to be passed against him.

Babu *Sreenath Das*, for the respondents.—Section 18 of Act XL of 1858 deals with the management of the minor's estate by the guardian; and management includes the power of mortgaging or even selling, and there can be no doubt that management includes the power of letting out

(1) 4 Russ. 298. (2) 5 C. 363.

properties on lease. The guardian, **[548]** after having taken out a certificate under the Act, can, with the sanction of the Court, grant a perpetual lease. Section 27 of Act VIII of 1890 goes to show that the guardian may do any act which is reasonable and proper for the benefit and maintenance of the estate. Section 29 provides that, in order to grant a lease for a term beyond five years, the guardian must take permission of the Court, and s. 31 deals with the manner in which permission is to be taken. [BANERJEE, J.—Section 31 says that it shall recite the necessity and the advantage. MACPHERSON, J.—We are in the dark as to what the necessity and advantage are?] When permission is granted, this Court ought to take it that it was for the benefit of the estate. Here permission was granted, and it must be presumed that it was granted by the Judge for the advantage of the minor. If the Judge does not recite the necessity upon the order, but if he, being satisfied as to the necessity and advantage to the minor upon the evidence, grants permission, could it be said that the sanction is void? I submit not.

The next question is, whether the suit is maintainable. It is a suit founded upon a contract made by a party legally authorized to enter into it, and, therefore, it is maintainable. When, under a sanction from the Court, the guardian enters into a contract, it is a valid one. The argument, that no suit for specific performance of a contract can be maintained against a minor, is not tenable. There is no analogy between the case of *Sikher Chund* v. *Dulputty Singh* (1) and this case. What Garth, C.J., said in that case was that a "purchaser who buys in good faith under an order of the Court, acquires a good title to the property sold, unless the minor, or those claiming under him, can show at a future time that the sale was fraudulent or improper." He decided that in such cases the *onus* would be upon the minor.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

In this case a decree has been made against the infant defendant Jugul Kishori Chowdhurani, who is the appellant before us, for the specific performance of a contract made on her behalf, and with the sanction of the District Judge, by Peary Sarkar, her **[549]** father and guardian duly appointed under the provisions of Act XL of 1858.

The main point taken is that the suit for specific performance is not maintainable against the infant. No relief is asked for against her guardian, who is not in his own person a party to the suit.

The contract sought to be forced is for a *putni* lease of certain properties belonging to the infant, at an annual rent of Rs. 487-4-8, on the payment of a *bonus* of Rs. 1,400. The facts found are these: The estate, which the infant inherited from her husband, being involved in debt, the defendant Enayatoolla agreed with the guardian to pay a *bonus* of Rs. 2,200, and to take a *putni* lease of the properties at an annual rent of Rs. 498-6-11. This arrangement was sanctioned by the District Judge on the 2nd June 1891, but Enayatoolla afterwards refused to take the lease, on the ground, as the Judge finds, that the title of the infant was threatened. The contract, now in question, was then made as between the plaintiffs and the guardian; and on the 25th July 1891, the District Judge made an order, in modification of his order of the 2nd June, sanctioning the arrangement. In August the plaintiffs paid Rs. 143 in satisfaction of two bonds

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executed by the infant's husband, and also paid the guardian a sum of Rs. 150 out of the bonus money. The guardian refused, however, to carry out the contract, and reverted to the old arrangement with Enayatoolla, which was carried into effect by two registered instruments on the 10th of August. The Judge finds that no part of the bonus of Rs. 2,200 was paid, and considers that the payment, which is sworn to by Enayatoolla and admitted by Peary Sarkar, was only set up to make it appear that the terms of the sanction had been complied with, and that the arrangement with Enayatoolla was more to the infant's benefit than the arrangements with the plaintiffs.

We know of no case in which a decree for specific performance has been made against an infant. In *Flight* v. *Bolland* (1) it was held that an infant could not maintain a suit for specific performance of a contract, the remedy not being mutual, and it being a general principle of Courts of Equity to interfere only where the remedy is mutual.

[550] It is unnecessary to consider whether, under the Contract Act, the contract of an infant is void, or only voidable at his instance. A contract, so long as it is voidable, cannot be specifically enforced, and an infant cannot ratify, so as to be bound by the ratification.

Here, however, the contract was made, not by the infant, but by the guardian on the infant's behalf. A guardian has, under the Hindu law, a qualified power of dealing with the property of an infant under his charge. He can, in case of necessity, sell, charge, or let it for a long term. But the infant is not absolutely bound by the act of the guardian; he could, on attaining majority, recover the property, if it had been disposed of without legal necessity: and in the case of an uncertificated guardian, the burden of proving legal necessity would, generally speaking, be on the person asserting it.

It is said that, as in this case, the guardian was appointed, and the contract sanctioned, by the District Judge, acting under statutory powers, there was a complete contract enforceable against the infant. A guardian appointed under Act XL of 1858, or Act VIII of 1890, cannot, without the sanction of the Court, give a lease for a period exceeding five years. If he does give it, the transaction is voidable at the instance of any other person affected by it. Section 31 of the Act (VIII of 1890) enacts that sanction shall not be granted, except in case of necessity, or for an evident advantage to the ward, and prescribes a procedure to be followed. The effect of the sanction was considered in the case of *Sikher Chund* v. *Dulputty Singh* (2). There the infant, on attaining majority, sued to recover the property, which had been sold by her guardian with the sanction of the District Judge. The case is an authority for this, that such a suit would lie; but that the sanction is *prima-facie* proof that the transaction was good, and binding, and that it was for the plaintiff to show that there was no legal necessity for it, or that it was fraudulent or illegal.

In our opinion, if it is open to the infant on attaining majority to question the transaction, a decree for specific performance cannot, or at all events should not, be made against him while an infant.

[551] More than this. The jurisdiction to decree specific performance is discretionary, although the discretion must be judicially exercised. No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant, unless the contract was shewn to be for the infant's benefit. It is not the case of any one that this contract

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should be enforced for the infant's benefit. The plaintiffs wish to enforce it against the infant for their own benefit, and the guardian says it is against the interest of the infant. The Judge thinks that, if the bonus of Rs. 2,200 was paid, the contract would not be for the infant's benefit; but he finds that it was not paid. The defendants, however, assert payment, and the guardian, acting for the infant, admits receipt of the money. The decision that it was not paid will not bind the guardian, or any of the defendants, as between themselves. It will not prevent the alleged payers from suing to recover the money, or the infant from charging her guardian with the receipt of it. The issue in the first Court was whether the contract was prejudicial to the infant, and this appears to have been more considered than the question whether it was for the infant's benefit that the contract should be enforced. We think it is not a case in which a decree for specific performance should have been made under any circumstances. It is unnecessary to consider whether the plaintiffs could get any relief against the guardian. It is enough to say that they are not entitled to the relief claimed as against the infant.

The appeal is decreed with costs in all the Courts. Decrees of the lower Courts set aside.

Appeal allowed.

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22 C. 551.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

ABZUL MIAH (*Defendant No.* 1) *v.* NASIR MAHOMMED AND OTHERS (*Plaintiffs*).* [7th March, 1895.]

Jurisdiction of Civil Court—Public right of way—Special injury—Cause of action—Right of suit.

In a suit for the removal of an obstruction in a public pathway it was [552] found by the Courts below that the plaintiffs were deprived of the only means of grazing their cattle by the obstruction, and that they lost some cows thereby. It was contended, on behalf of the defendant on second appeal, that such damage would not entitle the plaintiffs to maintain a suit in the Civil Court.

Held, that the injury caused to the plaintiffs, by the obstruction of the way, leading from the village where they resided to that in which they had their fields and pastures, was peculiar to them and to their calling, and it caused them substantial loss of time and inconvenience; and that it was sufficient to entitle the plaintiffs to maintain the action.

Held also, that the death of the cows was too remotely and indirectly connected with the obstruction to furnish a cause of action.

Winterbottom v. *Lord Derby* (1), *Ricket* v. *Metropolitan Railway Company* (2), *Cook* v. *Mayor and Corporation of Bath* (3), *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (4), *Gehanaji* v. *Ganpati* (5), *Raj Koomar Singh* v. *Sahebzada Roy* (6), *Blagrave* v. *Bristol Water Works Company* (7), and *Rose* v. *Miles* (8) referred to.

[F., 1 Ind Cas. 110 (111); R., 16 Ind. Cas. 962=23 M.L.J. 539 (541)= 12 M.L.T. 491= (1913) M.W.N. 991; 2 L.B.R. 134 (136).]

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* Appeal from Appellate Decree No. 224 of 1895 against the decree of Babu Atul Chunder Ghose, Subordinate Judge of Sylhet dated the 16th of November 1892, affirming the decree of Babu Akhoy Kumar Mitter, Sudder Munsif of that District, dated the 25th of August 1891.

(1) L.R. 2 Exch. 316. (2) L.R. 2 H.L. 175. (3) L.R. 6 Eq. 177.
(4) 3 B.L.R.A.C. 295=12 W.R. 160. (5) 2 B. 469.
(6) 3 C. 20. (7) 1 H. & N. 369. (8) 4 M. & S. 101.

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THE plaintiffs brought a suit in the Munsif's Court of Sylhet against the defendants for the removal of an obstruction in a certain pathway. The allegation of the plaintiff was that the way was a public thoroughfare; that they had been using it from time immemorial; that, by the obstruction caused by the defendants, the plaintiffs were deprived of their only way to take their cattle to graze from their village to the pasture land, and, in consequence thereof, some of their cows died, whilst they were being driven along another road. The defendants, in their written statement, denied that the way was a public way, and they pleaded that the suit was not maintainable by the Civil Court, and that it was barred by limitation. The Munsif decreed the suit, holding that the way in question was a public pathway; that the plaintiffs had proved such a special injury as would entitle them to maintain a suit in the Civil Court; and that the suit was not barred by limitation. On appeal the judgment of the Munsif was confirmed by the Subordinate Judge.

From this decision the defendant No. 1 appealed to the High Court.

[553] Babu *Tara Kishore Chowdhry*, for the appellant.

Babu *Prosonno Gopal Roy*, for the respondents.

Babu *Tara Kishore Chowdhry*.—The lower appellate Court has not come to any distinct finding as to the existence and nature of the way claimed. Further, the facts found in this case do not constitute "special injury," or "particular damage," as would give a cause of action to the plaintiffs. The Full Bench case of *Chuni Lall* v. *Ram Kishen Sahu* (1) lays down that the plaintiff must prove "special injury" to himself to maintain an action for obstruction on a public highway. In *Winterbottom* v. *Lord Derby* (2), which was an action for obstructing a public way, the plaintiff proved that he was on several occasions delayed in passing along it, and was obliged, in common with every one else who attempted to use it, to pursue his journey by a less direct road, or else to remove the obstruction at great expense to him. It was held that he was not entitled to maintain the action. The principle, that mere loss of time and general inconvenience caused by an obstruction, does not furnish a good cause of action, is recognized even in the case of *Rose* v. *Miles* (3), which may be supposed to be an authority against my contention. Then, again, the mere fact that a man carries on one particular profession, or calling, rather than another, and finds inconvenience in carrying on that business on account of an obstruction, does not make the damage peculiar to himself. If the mere fact that the plaintiff, in an action of this kind, shows that he has one particular calling, or trade, on account of which he usually passes along a particular pathway, and that he has been inconvenienced in respect thereto by an obstruction thereon, should be held sufficient proof of "special injury," in that case it will be impossible to draw the line and distinguish between injury that is special and injury that is not special. If, however, injury to person, or property, is caused *directly and substantially*, by the obstruction complained of, *that* only ought to be considered sufficient to furnish a cause of action for removal of the obstruction, but not otherwise. See *Caledonian Railway Company* v. *Walker's Trustees*(4), *Ricket* v. *Metropolitan Railway Company* (5). The [554] death of the cows under the circumstances found was certainly not caused directly by the obstruction; it was at most a very "*remote*" consequence.

(1) 15 C. 460. (2) L.R. 2 Exch. 316. (3) 4 M. & S. 101.
(4) L. R. 7 H. L. 259. (5) L.R. 2 H. L. 175.

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The mere fact that the plaintiffs in the present case have lost the shortest way to their fields and pasture lands is not special injury so as to furnish a good cause of action.

Babu *Prosonno Gopal Roy*, for the respondents.—The English cases cited by the other side have no application to this case. Even admitting that these cases have any application, then in a later case, the case of *Caledonian Railway Company* v. *Walker's Trustees* (1), where those cases were considered, it was held that inconvenience which one suffers, if he has to go by a longer route, the shorter one having been obstructed, is special injury, for which a suit would lie. The cases of *Rose* v. *Miles* (2) and *Blagrave* v. *Bristol Water Works Company* (3) go to support that view. See also Pratt on Highways, p. 120, Ed. 13th. In the case of *Raj Koomar Singh* v. *Sahebzada Roy* (4) it has been clearly laid down that special injury will entitle the plaintiff to maintain a suit for removal of an obstruction if the way is a public pathway. Here the finding of the Courts below is that the pathway is a public way, and personal inconvenience has been held to be special injury. See *Gehanji* v. *Ganpati* (5), *Raj Koomar Singh* v. *Sahebzada Roy* (4), *Caledonian Railway Company* v. *Walker's Trustees* (1), *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (6).

The finding of the Courts below that the plaintiffs lost their only way to take their cattle to graze to the pasture lands is sufficient to entitle them to a decree, even if the death of the cows be left out of consideration.

Babu *Tara Kishore Chowdhry* in reply.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiffs, respondents, for declaration of their right of way over a piece of land and for removal of the obstruction caused to it by the defendants. The case of the plaintiffs, as stated in their plaint, **[555]** is, that the land in dispute has been used as a public pathway from time immemorial, and the plaintiffs had been using it as such from the time of their ancestors; that the pathway leads from the village where they reside to the villages where they have the lands which they cultivate and the pastures where they graze their cattle; that the defendants have wrongfully caused obstruction to the way and thereby stopped it; that there is no other convenient pathway for leading the plaintiffs' cattle to another village, and some of their cattle had died in consequence; and that, owing to the obstruction of the pathway, the plaintiffs feel great inconvenience and suffer great loss.

The defendants urge that the suit is barred by limitation, and by the principle of *res judicata*; that the land is their property and was never used as a pathway by any one; and that, on the plaintiff's own allegation that the way is a public pathway, the suit is not cognizable by the Civil Court.

The Courts below have overruled the objections of the defendants, and have decreed the suit.

In second appeal, it is contended for the defendants, *first*, that the Court of appeal below is wrong in affirming the decree of the first Court in favour of the plaintiffs, without coming to a distinct finding as to the

(1) L.R. 7 H.L. 259 (276).
(2) 4 M. & S. 101.
(3) 1 H. & N. 369.
(4) 3 C. 20.
(5) 2 B. 469.
(6) 3 B.L.R. A.C. 195 = 12 W.R. 160.

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existence and nature of the way claimed; and, *secondly*, that neither the facts found by the Court below, nor even those alleged in the plaint, are sufficient to constitute such special injury as is necessary to entitle the plaintiffs to maintain a civil suit for the removal of obstruction in a public way.

Upon the first contention, it is enough to say that we think the lower appellate Court has come to a definite finding that the existence of the pathway in dispute is proved, and that it is a public way. The learned Subordinate Judge says: "The Munsif himself has testified to the fact of the existence of the pathway;" and, a little further on, he adds, "The claim is not barred by limitation, as it is not dependent merely on s. 26 of the Limitation Act" and the Munsif whose judgment is thus affirmed said: "The present suit is not based on user, but on special inconvenience caused in a public thoroughfare. The said s. 26, therefore, does not apply."

[556] The second point, which is the one that was elaborately argued on both sides, requires a more close examination.

The rule of English law on the subject is, that, in order to entitle a plaintiff to maintain an action for obstruction of a highway, he must show a particular damage suffered by himself over and above that suffered by all the Queen's subjects. Where this is shown, a suit for damages, or for an injunction, would lie. See *Winterbottom* v. *Lord Derby* (1), *Ricket* v. *Metropolitan Railway Company* (2), *Cook* v. *Mayor and Corporation of Bath* (3); and the same rule has been substantially followed in this country. See *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (4), *Gehanaji* v. *Ganpati* (5), *Raj Coomar Sing* v. *Sahebzada Roy* (6). In the last mentioned case, Garth, C.J., in delivering the judgment of the Full Bench, said: "We are of opinion that, as the obstruction in this case has caused special injury to the plaintiff, the Civil Court was perfectly justified in directing it to be removed.

"The Criminal Code, no doubt, contains provisions for the removal of obstruction in public thoroughfares, by summary proceedings before a Magistrate, but there is nothing in the provisions which shows that the Legislature intended to deprive a private individual of the redress which the law affords him under such circumstances by means of a civil suit." And the provisions of the Criminal Procedure Code, which the Full Bench had under consideration (Act X of 1872, s. 521), were substantially the same as those of the present Code (Act X of 1882, s. 133), so far as the question now before us is concerned.

That being so, the question for consideration is, whether the facts found in this case are sufficient to constitute particular damage within the meaning of the rule as enunciated in the English cases, or special injury within the meaning of the rule as laid down by the Full Bench in the Catcutta case last cited.

The Munsif found that the plaintiffs "have been deprived of the only means of grazing their cattle;" that "plaintiffs Nos. 1 [557] and 2 have sustained special injury, namely, plaintiff No. 1, by losing two, and plaintiff No. 2, by losing one of his cows;" and that "this special inconvenience and special injury gave jurisdiction to the Civil Court:" and the lower appellate Court has substantially affirmed this finding.

The learned vakil for the appellant contends that the loss of the cows was not a proximate and necessary consequence of the obstruction

(1) L.R. 2 Exch. 316. (2) L.R. 2 H.L. 175. (3) L.R., 6 Eq. 177.
(4) 3 B.L.R. A C. 295=12 W.R. 160. (5) 2 B. 469. (6) 3 C. 20.

of the pathway; and he further contends that the inconvenience complained of was one which was not special to the plaintiffs, but must have been felt by them in common with the rest of the public; so that neither the loss sustained, nor the inconvenience felt, would be sufficient to entitle them to maintain the action, and, in support of his contention, he relied upon some of the English cases referred to above.

We agree with the learned vakil for the appellant in thinking that the loss of the cows was but remotely and indirectly, if at all, the result of the obstruction, and that it would not afford ground for maintaining this suit. But we are of opinion that the other injury complained of in the plaint as set out above, and found in effect by the Courts below, is special injury within the meaning of the law sufficient to entitle the plaintiffs to bring this suit. The plaintiffs are cultivators and they keep cattle; and the way in question leads from the village where they live to their fields and pastures, and the path being stopped, they have been "deprived of the only means of grazing their cattle," and put to special inconvenience. In *Winterbottom* v. *Lord Derby* (1), Kelly, C. B., observes: "Upon the authorities there, and especially relying on *Iveson* v. *Moore* (2), and *Ricket* v. *Metropolitan Railway Company* (3), I am of opinion that the true principle is that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling." We think upon the facts of this case the requirements of this principle are fully satisfied.

We may here refer to two more cases in support of the view we take. In *Blagrave* v. *Bristol Water Works Company* (4) the plaintiff, in the ninth count, alleged that the defendants, by **[558]** obstructing a public footpath connecting two of his fields, caused him loss of time and work, and the Court held that this count was good. And in *Rose* v. *Miles* (5), Lord Ellenborough said: "If a man's time, or his money, are of any value, it seems to me that the plaintiff has shown a particular damage."

We are clearly of opinion that the injury caused to the plaintiffs by the obstruction of the way leading from the village where they reside to that in which they have their fields and pastures is peculier to them and to their calling; it causes them substantial loss of time and inconvenience; and it is of a kind different from that which the public generally may suffer by reason of the obstruction; and that, upon reason and authority, it is, therefore, sufficient to entitle them to maintain this action.

The grounds urged before us, therefore, both fail; and this appeal must consequently be dismissed with costs.

S. C. G. *Appeal dismissed.*

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(1) L.R. 2 Exch. 316. (2) 1 Ld. Raym. 486. (3) L.R. 2 H.L. 175.
(4) 1 H. and N. 369. (5) 4 M. and S. 101.

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Before Mr. Justice Macpherson and Mr. Justice Banerjee.

SHAM LAL PAL AND OTHERS (*Decree-holders*) *v.* MODHU SUDAN SIRCAR AND OTHERS (*Judgment-debtors*).* [15th March, 1895.]

Execution of decree —Transfer of decree for execution—Execution against representative of debtor—Civil Procedure Code (Act XIV of 1882), *ss.* 234, 248, 249 *and* 578—*Application by decree-holder for execution of decree by substitution on death of the judgment-debtor to the Court where the decree has been transferred.*

A decree was transferred to another Court for execution. Pending the proceedings, one of the judgment-debtors died. On an application to that Court by the judgment-creditor to execute the decree against the legal representative of the deceased judgment-debtor, a notice was issued under s. 248 of the Code of Civil Procedure. The legal representative objected that the Court had no jurisdiction to entertain the application, and that the application should have been made under s. 234 of the Code to the Court that passed the decree.

Held, that the power of the Court executing a decree to order execution under s. 249 against the legal representative of a deceased judgment-**[559]** debtor, after the issue of notice under s. 248, is not cut down by the provisions of s. 234, which simply empowers the decree-holder to apply to the Court which passed the decree to execute it against the legal representative of a judgment-debtor who is dead, and that the Court where the decree has been transferred has full jurisdiction to allow execution to proceed against the legal representative.

Held also, that even assuming that an application under s. 234 to the Court which passed the decree was a necessary preliminary to proceedings under s. 248 by the Court executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and, under s. 578, the order of the Court of first instance should not have been reversed on account of such irregularity.

[**N.F.**, 28 M. 466 (471) (**F.B.**) = 15 M.L.J. 116 ; **R.**, 12 M.L.J. 24 (32) ; **Cons.**, 9 C.L.J. 443 (446) = 13 C.W.N. 533 ; **D.**, 27 C. 488 (493).]

THIS appeal arose out of an application by the judgment-creditors to execute a decree against the legal representative of a deceased judgment-debtor. The decree was one passed by the High Court in its original jurisdiction, which was transferred to the Subordinate Judge's Court of Barisal for execution. Pending the proceedings, one of the judgment-debtors died, and a notice was issued by the Subordinate Judge against the legal representative under s. 248 of the Code of Civil Procedure. The legal representative appeared and objected that the Court had no jurisdiction to entertain the application. The Subordinate Judge overruled the objection, and directed execution to proceed against the legal representative. On appeal to the District Judge he reversed the order of the Subordinate Judge, and dismissed the application of the judgment-creditors.

Against this order the judgment-creditors appealed.

Dr. *Rash Behari Ghose* and Dr. *Asutosh Mookerjee*, for the appellants.

Babu *Mohini Mohun Roy* and Babu *Upendra Gopal Mitter*, for the respondents.

Dr. *Rash Behari Ghose.*— Under ss. 234, 248 and 249 of the Code of Civil Procedure, the decree-holder may apply for execution to either of the Courts, *i.e.*, to the Court which passed the decree, or to the Court where the decree is sent for execution. Section 234 does not say that

* Appeal from Order, No. 157 of 1894, against the order of A. E. Staley, Esq., District Judge of Backergunge, dated the 20th of March 1894, reversing the order of Babu Dwarkanath Mitter, Subordinate Judge of that District, dated the 5th of September 1893.

the application must be made to the Court which passed the decree. The word *may*, in that section, does not mean *shall*. Section 239 refers only to applications on the part of the judgment-debtor and s. 235 deals with the [560] mode of execution. If the judgment-debtor has no property within the jurisdiction of the Court, it has no power to entertain an application for execution. The Subordinate Judge having made an order, the Judge had no power to set it aside, on the ground of mere irregularity, when it did not affect the merits of the case. An objection to jurisdiction cannot be made by way of appeal, but must be made by way of revision, see *Combe* v. *Edwards* (1). In this country it must be shown that not only was there an irregularity, but that the irregularity was such as to affect the merits of the case. This application is, in fact, a continuance of the previous application for execution: see *Sheo Prasad* v. *Hira Lal* (2).

Under s. 244, if any question arises as to who is the legal representative, that question may be decided either by the Court executing the decree, or that Court may send it to the Court which passed the decree for determination.

Babu *Mohini Mohun Roy*, for the respondents.—Under s. 223 of the Civil Procedure Code, before a decree can be transferred to another Court for execution, it must be shown that there exists some ground personally affecting the debtor. The conditions mentioned in clauses *a*, *b*, *c*, *d* are the only ones under which a decree can be transferred to another Court for execution. In order to construe s. 234, we must not overlook the conditions under which a decree can be transferred. That being the case, the Court which passed the decree is the proper Court for entertaining an application to execute the decree against the legal representatives. It may be that in this case the judgment-debtor has property within the jurisdiction of the Court to which the decree has been transferred for execution; but that does not matter. If, in the Court where the decree has been transferred for execution, an objection is taken to the application, the proper order to pass is that the decree-holder should apply to the Court which passed the decree for an order under ss. 248 and 249 of the Code. To get an order under s. 248, the decree-holder must apply first to the Court which passed the decree under s. 234. Section 244 has no application to the present case.

[561] Dr. *Rash Behari Ghose*, in reply.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

In this case a decree of this Court on its original side was sent to the Backergunge Court for execution. While the proceedings were pending there, one of the judgment-debtors died, and an application was made to the Backergunge Court to execute the decree against the legal representative of the deceased judgment-debtor. Upon that, notice was issued under s. 248, calling upon the legal representatives to appear and shew cause why the decree should not be executed. They did appear, and the only objection they took was that the Court had no jurisdiction in the matter, as the application to execute the decree against them should, under s. 234 of the procedure Code, have been made to the Court which passed the decree. This objection was overruled, and they

(1) L. R. 3 P.D. 103 (128). (2) 12 A. 440.

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then appealed to the District Judge, who held that the objection was good and allowed the appeal. Whatever the precise meaning and effect of s. 234 may be, it is quite clear that when the enforcement of a decree is applied for against the legal representative of a party to the suit, the Court executing the decree must, under s. 248, issue the notice prescribed in that section to such representative, and can, under s. 249, make an order for execution, after hearing the objections, if any, preferred by the person to whom notice was given. The contention for the respondent is, that, under s. 234, the Court which passed the decree is the only Court which can order execution against the legal representative of a deceased judgment-debtor, or at least that the application under s. 234 is a necessary preliminary to a notice under s. 248, or an order under s. 249. We find in the Code no warrant for this contention. The power of the Court executing a decree to order execution under s. 249 against the legal representative of a deceased judgment-debtor, after the issue of notice under s. 248, is not cut down by the provisions of s. 234, which simply empowers the decree-holder to apply to the Court which passed the decree to execute it against the legal representative of a judgment-debtor who is dead. Before we can hold that the Court executing the decree could not make the order for execution, which, in this instance, it has made, **[562]** we must find in the Code some limitation of its power in this respect, or some provision by which the power to order execution in the first instance against a legal representative of a deceased judgment-debtor is confirmed exclusively upon some other Court.

We think, therefore, that the view taken by the District Judge is wrong. Even assuming that an application under s. 234 to the Court which passed the decree was a necessary preliminary to proceedings under s. 248 by the Court executing the decree, the omission to make it was only an irregularity; and, under s. 578, the order should not have been reversed on account of an irregularity which did not affect the merits of the case. It seems clear that in this case there are no merits, because the objection which was taken to the execution of the decree was a technical one. The legal representatives of the judgment-debtor were not in any way prejudiced by the application being made in the Backergunge Court, as admittedly they then resided within the jurisdiction of that Court.

The order of the District Judge must be set aside, and that of the Subordinate Judge restored. The appellants are entitled to their costs both in this Court and in the lower appellate Court.

S. C. G. *Appeal allowed.*

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22 C. 562.

ORIGINAL CIVIL.

Before Mr. Justice Hill.

NRITTO LALL MITTER *v.* RAJENDRO NARAIN DEB AND OTHERS.*
[4th April, 1895.]

Specific Relief Act, s. 9—Nature of possession giving right of suit—Juridical possession.

Where the plaintiff alleged that he was in possession of a certain room as representing his father and uncle, who were alive but who were not parties to the suit, and that he had been dispossessed from such room within six months

* Original Civil Suit No. 9 of 1894.

of the institution of the present suit: *Held*, that his possession not being juridical possession did not entitle him to maintain a suit under s. 9 of the Specific Relief Act.

Permission to be allowed to amend the plaint by alleging that the possession of the plaintiff was exclusive possession on his own account was not allowed, such allegation being inconsistent with the case on which he came into Court.

[R., 21 B. 98 (101); 31 C. 48 (51) (F.B).]

[563] IN this case the plaintiff sought to recover possession of a certain room in the Sova Bazar Rajbari, which formed part of the trust estate left by the late Sir Rajah Radhakant Deb Bahadoor. The plaint alleged that the plaintiff was a great-grandson by daughter of the late Rajah; that the plaintiff's father, Ruplal Mitter, and Shamlal Mitter, being grandsons by daughter of the Rajah, were entitled to and were in possession and enjoyment of a portion of the said dwelling-house of the Rajah under the provisions of his will; that, as representing Shamlal Mitter and Ruplal Mitter, the plaintiff was in exclusive possession of a room on the first floor of the outer apartments, where he had kept a wooden almirah, and the said room was under his lock and key; that on the 8th of July 1893 the defendants forcibly broke open the padlock, removed the wooden almirah, and forcibly took possession of the room, thereby dispossessing the plaintiff otherwise than in due course of law. The plaint was filed on the 4th of January 1894, and asked that the plaintiff might be put in possession of the said room.

Mr. *Dunne* and Mr. *Chaudhuri*, for the plaintiff.

Mr. *Jackson*, Mr. *R. Mittra* and Mr. *Sinha*, for the defendants.

Mr. *Dunne*.—The dispossession took place within six months before the date of the institution of the suit, and the suit being under s. 9 of the Specific Relief Act, the only question is, was the plaintiff in possession on the 8th of July 1893, and was he dispossessed on that day. The questions of title raised in the written statement could not be gone into.

Mr. *Jackson*, for the defendants, took the preliminary objection that the plaint disclosed no cause of action. The allegation being that the father and uncle were in possession, and the plaintiff in possession only as representing them, he has no right of action. His occupation is the same as that of a servant; it does not amount to juridical possession. Dicey's Parties to an Action, pp. 336, 337; Bullen and Leake's Pleadings 3rd edition, p. 417; *Bertie* v. *Beaumont* (1); *White* v. *Bayley* (2); *Wright* v. *Stavert* (3); Pollock on Possession, p. 56; Markby's Elements of Law, pp. 189, 193. See also *Amirudin* v. *Mahamad Jamal* (4), and the notes to s. 9 of Nelson's Specific Relief Act.

[564] Mr. *Dunne* in reply.—Under the Rajah's will the plaintiff is also entitled to possession as a member of his father's family; if necessary he asks for leave to amend the plaint.

JUDGMENT.

HILL, J.—This is a suit brought by the plaintiff under s 9 of the Specific Relief Act for the recovery of possession of a room situated on the first floor of the outer apartments in No. 35/1, Rajah Nobokissen's Street. It has been objected, on behalf of the defendants, that the plaint discloses no cause of action. What the plaintiff says in effect is this: That originally the house to which this room belongs was the family dwelling-house of Rajah Sir Radhakant Deb, who died in 1868, having

(1) 16 East 33.
(2) 10 C.B.N.S. 227 (235).
(3) 2 E. and E. 721.
(4) 15 B. 685.

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made a will in 1863; and that, under that will, the plaintiff's father and uncle are in possession and enjoyment of a portion of the house. It must be taken that they are so in possession of that portion of the house in which the room in suit is situated.

Then in the fourth paragraph, and it is on this that the defendant founds his contention, it is said that, as representing his uncle (Shamlal Mitter) and father (Ruplal Mitter), the plaintiff was, until the date thereinafter mentioned, in possession of, amongst others, the room in suit; and the plaintiff goes on to say, that, in July 1893, the defendants forcibly broke open the padlock of that room and took possession of the room, thereby dispossessing the plaintiff.

The defendants contend that the possession intended by s. 9 of the Specific Relief Act must be what is described in certain of the authorities to which reference has been made as juridical possession, and that all that the plaintiff discloses in his plaint is a possession as representing his father and uncle, and that in effect the possession on which he relies, so far as its character is disclosed in the plaint, is not his own, but his father's and uncle's; and it is argued that a possession of that description is not juridical so as to entitle him to succeed in this suit: to put it shortly, that the possession relied on is not his own, but that of some one else.

On the other hand, the plaintiff, in reply to Mr. Jackson's objection, suggests that some other meaning is to be attributed to the expression "as representing his father and uncle," which occurs in the fourth paragraph of the plaint, and that what the [565] plaintiff is there asserting is an exclusive possession, not in a representative capacity at all, but on his own account. I confess I cannot put that interpretation upon the plaint; and I think accordingly that since, on the face of the plaint, it appears that if any one is entitled to be put in possession of this room in terms of the Act in consequence of the ouster in 1893, it is the father and uncle of the plaintiff, who were the persons really in possession of the room prior to that date, effect must be given to the defendants' objection, and the suit must fail.

It was urged by Mr. Dunne that, if I proposed to give effect to this objection, it would be proper that the plaintiff should be permitted to amend his plaint in order to show that the possession he held prior to the ouster of July 1893 was not on account of his father and uncle, but exclusively on his own account. It seems to me that that would be to permit the plaintiff to set up an allegation totally inconsistent with the case on which he came to Court, and I should not allow it at this stage.

The result is the suit must be dismissed with costs on scale 2.

Suit dismissed.

Attorneys for the plaintiff: Mr. *N. C. Bose.*

Attorney for the defendant: Messrs. *Kally Nath Mitter and Sarvadhicarry.*

C.S.

22 C. 565.

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APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

FAIZUDDIN ALI KHAN AND ANOTHER (*Decree-holders*) v. TINCOWRI SAHA (*Auction-purchaser*) AND OTHERS (*Judgment-debtors*).*
[1st April, 1895.]

Sale in execution of decree—Civil Procedure Code (Act XIV of 1882), *s.* 313*—Application by auction-purchaser to set aside a sale on the ground that the judgment-debtors had no saleable interest in the property—Effect of an adoption by a co-widow after the estate has been vested in the other widow.*

A Hindu, governed by the Mitakshara law, died, leaving him surviving two widows, *G* and *B*, and a son, *S*, by *G*. By a will he authorized his widow *B*, to adopt a son, in the event of *S* dying unmarried; but he made no **[566]** disposition of his property, which was left to devolve according to Hindu law. *S* died unmarried in the year 1290 (1883), and *B* adopted a son in the same year to which adoption *G* was not a party. In the year 1296 (1889), in order to liquidate debts of their husband, the widows executed a mortgage-bond in favour of one *F*, who obtained a decree in 1299 (1892). In execution of that decree the mortgaged properties were sold and purchased by a third party. On an application made by the auction-purchaser to set aside the sale, on the ground that the judgment-debtors had no saleable interest in the property, as it had, upon the adoption, vested in the adopted son.

Held, that as an adopted son is not entitled to claim, as preferential heir, the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir, other than the widow who adopted him, the adoption by *B* could not have the effect of divesting *G* of the estate which had devolved upon her as heir of her son, and if that was so, it could not be said that the judgment-debtors had no saleable interest in the property, and therefore the sale could not be set aside.

Held, also, that *G* was not under any such religious obligation to give her assent to the adoption by *B* as should have the effect of divesting her of the estate.

Lakshman Dada Naik v. *Ramchandra Dada Naik* (1), *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee Chowdhry* (2), *Annammah* v. *Mabbu Bali Reddy* (3), *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (4), *Mondakini Dasi* v. *Adinath Dey* (5), and *Surendra Nandan* v. *Sailaja Kant Das Mahapatra* (6) referred to.

[F., 28 B. 461 (465) = 6 Bom.L.R. 464 (465); 2 C.L.J. 87 = 9 C.W.N. 795.]

THIS appeal arose out of an application made by the auction-purchaser under s. 313 of the Civil Procedure Code to set aside a sale, on the ground that the judgment-debtors had no saleable interest in the property sold. One Narain Singh died, leaving him surviving two widows, Golap Kumari and Bhabani Kumari, and a son, Shib Persad, by Golap Kumari. Narain Singh left a will; it contained, amongst others, the following provisions: "If the present minor son dies in an unmarried state, then my second wife Bhabani Kumari, shall, according to law be competent to adopt a *dattak* son from a good family to the number of three successively, one after the death of the other, and the *dattak* son shall inherit the property . . ." In the year 1290 (1883) Shib Persad died unmarried; and Bhabani Kumari, by **[567]** virtue of the authority given by the will, adopted a son in the same year. In the year 1296 (1889-90), the widows, in order to liquidate the debts of their husband, executed a mortgage-bond

* Appeal from Order No. 100 of 1894, against the order of Babu Kali Charan Ghosal, Subordinate Judge of Murshidabad, dated the 11th of December 1893.

(1) 5 B. 48 = L.R. 7 I.A. 181. (2) 3 W.R.P.C. 15 = 10 M.I.A. 279. (3) 8 M.H.C. 108. (4) 12 C. 246. (5) 18 C. 69. (6) 18 C. 385.

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in favour of one Nawab Syed Faizuddin Ali Khan and another, and a decree was obtained by them in the year 1299 (1892). In execution of this decree, the property mortgaged was sold and purchased by one Tincowri Saha. Subsequently, an application to the Subordinate Judge was made, under s. 313 of the Civil Procedure Code, on behalf of the auction-purchaser, to set aside the sale. The Subordinate Judge set it aside, holding that the judgment-debtors had no saleable interest in the property. The material portion of his judgment was as follows:—

"The adoption having taken place, it remains to be decided whether, notwithstanding that, the widow, Golap Kumari, possessed any interest in the property left by her husband. I am of opinion that she ceased to possess any interest as soon as the adoption took place. Golap Kumari having succeeded to the estate after the decease of her son, Shib Persad, it might seem doubtful whether the co-widow would divest her of that estate by adopting Janki Persad; but the question does not arise here, when it is found in the will of Narain Singh that he made a gift over in favour of his adopted son, after the death of Shib Persad. The gift over is a valid bequest, and the adopted son, as soon as he was adopted, became vested with the property, as he was living just at the time of the death of Narain Singh. The will is quite clear on the point, as it shows a distinct intention on the part of the testator of providing a gift over in favour of the adopted son, in preference to the widows, and I think it is a valid gift too."

From this order the auction-purchaser appealed to the High Court.

Babu *Golap Chunder Sarkar*, for the appellants.

Dr. *Rash Behari Ghose* and Babu *Dwarka Nath Chuckerbutty*, for the respondents.

Babu *Golap Chunder Sarkar*.—The properties of Narain Singh, being ancestral and not self-acquired he was not competent to make any devise. There was no devise to any person under the will. He only contemplated what would take place according to Hindu Law, and there was no gift over at all. The Hindu Wills Act (XXI of 1870) applies to this case, and s. 3 of that Act provides that "nothing herein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*."

[568] A member of a joint Mitakshara family cannot devise by will without the consent of his co-parceners: See Mayne's Hindu Law, 5th edition, p. 462. In the case of *Hanmant Ramchandra* v. *Bhima Charya* (1) the incapacity of a co-parcener to alienate his undivided share of the property has been discussed. In that case the testator died, leaving him surviving his widow, who was then pregnant, and a son whom he had adopted. Some days before his death, he executed a will, by which he directed that, in the event of a son being born to him after his death, the property should be divided between such son and his adopted son, but otherwise all his property should go to the adopted son. The plaintiff in that case was the son born to the testator after his death, and he brought the suit to recover possession of the property from the adopted son. It was held that the will of the testator was inoperative, in so far as it reduced the plaintiff's share to a moiety of the property: see also *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (2). The decree, obtained, against the widows, shows that the debt was one for legal necessity. As to the *factum* of adoption, it was not known to the decree-holder, and the other side has given no evidence of it. The will does not affect the devolution

(1) 12 B. 105. (2) 5 B. 48 = L. R. 7 I. A. 181.

of the property see *Annammah* v. *Mabbu Bali Reddy* (1). The facts of that case are similar to this case. [BANERJEE, J.—Here the case is, that the property was vested in one of the widows, that is the difference.] That does not make any difference, because the widow does not claim through her deceased husband. In this case, the last full owner was the son, and not the father, and the estate having been vested in Shib Persad, the adopted son can only claim as brother to the last full owner, but cannot divest the widow of the property which she inherited as heir of her son, and not of her husband. See *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee Chowdhry* (2), *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (3), *Chandra Bin Bhau* v. *Gojarabai* (4), *Keshav Ramkrisna* v. *Gobind Gonesh* (5).

[569] Dr. *Rash Behari Ghose*, for the respondents.—In the case of *Mondakini Dasi* v. *Adinath Dey* (6), it was held that the adoption by the younger widow had the effect of divesting the interest of the elder widow in the estate. In that case the adoption by the younger widow was made owing to the refusal of the elder widow to adopt. A widow is bound to give her consent to the adoption by a co-widow for the spiritual benefit of the husband. See *Rakhmabai* v. *Radhabai* (7). If it was the duty of Golap Kumari to give her assent to the adoption, I submit she ought to be precisely in the same position as if she had told the other widow to adopt a son. She cannot question the adoption.

When there are two judgment-debtors, if one of them at least had no saleable interest in the property, as in this case, then the sale ought to be set aside. There can be no question that, after the adoption, the adoptive mother had no saleable interest in the property.

Babu *Golap Chunder Sarkar*, in reply.—The case of *Rakhmabai* v. *Radhabai* (7) was the case of two widows, and there was no son. Where a man dies without leaving a son, then there might be spiritual obligation on the part of one of the widows to give her consent to the adoption by the other widow.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order passed by the Subordinate Judge of Murshidabad, under s. 313 of the Code of Civil Procedure, setting aside a sale of immoveable property, on the ground that the judgment-debtors had no saleable interest in it.

The decree, in execution of which the sale was held, was obtained by the appellants before us against Golap Kumari Barmania and Bhabani Kumari Barmania, widows of the late Narain Singh, upon a mortgage executed by them in favour of the decree-holders. After the sale had taken place, applications were made by the judgment-debtors and by the auction-purchaser for setting aside the sale, the former contending that the sale was vitiated by irregularity resulting in loss to them, and the latter contending that the judgment-debtors had no saleable interest in **[570]** the property sold. The application of the judgment-debtors was disallowed, but that of the auction-purchaser was granted by the Court below, the learned Subordinate Judge being of opinion that the judgment-debtors, Golap Kumari and Bhabani Kumari, had no saleable interest in the

(1) 8 M. H. C. 108. (2) 3 W. R. P. C. 15=10 M. I. A. 279.
(3) 12 C. 246. (4) 14 B. 463. (5) 9 B. 94.
(6) 18 C. 69. (7) 5 B.H.C.A.C. 181.

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property sold, as the property, which originally belonged to the husband of those ladies, had vested in one Janki Singh, who had been adopted by Bhabani Kumari in accordance with the permission of her husband, Narain Singh.

In appeal it is contended, on behalf of the decree-holders, that this decision is wrong, and that, *firstly*, the Court below ought to have held that the judgment-debtors, or rather one of them, Golap Kumari, was entitled to the estate as heiress of her deceased son, Shib Persad, in whom the estate had vested on the death of Narain Singh; and, *secondly*, the Court below ought further to have held that even if the estate was vested in Janki Singh, the adopted son, still it was saleable in execution of the decree obtained by the appellants, as that decree was based upon a mortgage executed by the widows for the satisfaction of the debts of their deceased husband.

The facts upon which the first contention is based, and which are not disputed before us, are shortly these: The property in dispute belonged to one Narain Singh, a Hindu governed by the Mitakshara law, who died, leaving him surviving two widows, Golap Kumari and Bhabani Kumari, and a son, Shib Persad, by the former. The property was the ancestral property of Narain Singh, having been inherited by him from his father. Narain Singh, by a document which is styled a will, authorised his widow, Bhabani Kumari, to adopt a son, in the event of his son, Shib Persad dying unmarried; but he made no disposition of his property, which was left to devolve according to Hindu law. Upon the death of Shib Persad, who died unmarried, Bhabani Kumari, according to the permission of her husband, adopted Janki Singh in the year 1290. The mortgage-bond, upon which the decree in favour of the appellants is based, was executed in Chait 1296, and the decree is dated the 9th December 1892, that is, sometime in 1299. Upon these facts the learned vakil for the appellants contends, that, as the family is governed by the [571] Mitakshara law, and as the property in question was Narain Singh's ancestral property, he could not have disposed of it in any way, even if his so-called will contained, or could be construed to contain, any provision relating to the disposal of his property, and controlling or limiting the estate to be taken by his son; that, on his death, the property vested absolutely in his son, Shib Persad; that, on Shib Persad's death, the property was inherited by Golap Kumari as his mother; and that the adoption by Bhabani Kumari of a son to Narain Singh could not divest the estate that was vested in Golap Kumari as heiress of Shib Persad. In support of this argument, several cases were cited, of which we may notice here only the case of *Lakshman Dada Naik* v. *Ramachandra Dada Naik* (1), which is clearly an authority for the proposition that a Hindu, governed by Mitakshara law, cannot dispose of his property in whole or in part by will, if he has a son or any other co-parcener joint with him; and the cases of *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee Chowdhry* (2), *Annamah* v. *Mabbu Bali Reddy* (3), and *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (4), which establish the proposition that an estate vested by inheritance in any person cannot be divested by a subsequent adoption to a person other than the person from whom the first mentioned party claims. On the death of Shib Persad, the property, which originally belonged to Narain Singh, and had vested completely in Shib Persad, passed by inheritance to

(1) 5 B. 48=L. R. 7 I. A. 181.
(2) 3 W.R. P.C. 15=10 M.I.A. 279.
(3) 8 M.H.C. 108.
(4) 12 C. 246.

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his mother, Golap Kumari; she was not a party to the adpotion of Janki Singh, and, the adoption of Janki Singh by Bhabani Kumari, as an adopted son to Narain Singh, cannot have the effect of divesting Golap Kumari of the estate she inherited from her son.

The learned vakil for the respondents relied strongly upon the cases of *Mondakini Dasi* v. *Adinath Dey* (1) and *Surendra Nandan* v. *Sailaja Kant Das Mahapatra* (2), but those cases are clearly distinguishable from the present. In both those cases, the adopted son who claimed the property, divesting the estate of a person in whom it **[572]** had already become vested, was the adopted son of the last male proprietor, the person whom he claimed to divest being his step-mother by adoption (if one may use that term), in the one case, and a co-parcener of his adoptive father in the joint estate, in the other case. The person whose adoption is said to have a divesting effect in the present case, namely, Janki Singh, is however, not the adopted son of the last male owner, Shib Persad, but is the adopted son of his father, Narain Singh, who owned the estate before Shib Persad; and in our opinion this constitutes an important point of distinction. The rule of law that was followed in the case of *Mondakini Dasi* v. *Adinath Dey* (1) is stated in these words: "A son adpoted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate, and to divest the interest of any person in that estate, whose title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner; but such adopted son is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopts him." We think the present case comes clearly within the scope of the latter part of the rule thus enunciated.

It was argued that Golap Kumari, the elder widow of Narain Singh, was under a religious obligation to assent to the adoption by Bhabani Kumari; and that if that was so, the adoption by Bhabani Kumari ought to be regarded as an adoption with the implied assent of Golap Kumari; and thus there would be no injustice in the adoption having the effect of divesting her of the estate. It is not alleged that Golap Kumari gave any express consent to the adoption of Janki Singh by Bhabani Kumari. That being so, and Golap Kumari having inherited the property, not from her husband, but from her son, we think it would be going too far to hold that she was under any such obligation to give her assent to the adoption by her co-widow as should have the effect of divesting her of her estate in this case.

Upon the authorities, therefore, we must hold that the adoption by Bhabani Kumari would not have the effect of divesting **[573]** the estate of Golap Kumari, and, if that was so, it could not be said that the judgment-debtors had no saleable interest in the property.

It was contended for the respondents that one of the judgment-debtors, at any rate, namely, Bhabani Kumari, had no interest of any kind in the property sold upon any view of the case. That may be quite true, but that does not in any way improve the respondents' position; for though Bhabani Kumari, in the view we take of the case, had no interest in the property sold, Golap Kumari, the other judgment-debtor, owned the entire interest in it.

(1) 18 C. 69. (2) 18 C. 385.

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In this view of the case, it becomes unnecessary to consider the second contention raised on behalf of the appellants.

The order of the Court below, setting aside the sale, on the ground that the judgment-debtors had no saleable interest in the property sold, must be reversed, and the sale confirmed. The appellants are entitled to their costs.

S. C. G. *Appeal allowed.*

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22 C. 573.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Beverley.

DARBARI MANDAR (*Petitioner*) *v.* JAGOO LAL (*Opposite party*).*
[8th April, 1895.]

Sanction for prosecution—Criminal Procedure Code (*Act X of* 1882), ss. 437, 438 *and* 195—*Power of the Sessions Judge to interfere with orders passed by the District Magistrate—Fresh sanction, grant of, after expiry of six months from the date of the first sanction.*

Both the Sessions Judge and the District Magistrate are competent, under s. 437 of the Criminal Procedure Code, to order a further enquiry; but the Sessions Judge has no jurisdiction to review an order made by the District Magistrate under that section refusing a further enquiry. It is open to the Sessions Judge to refer the matter to the High Court under s. 438.

If six months expire after the grant of sanction under s. 195 of the Criminal Procedure Code, and no prosecution is commenced under it within that time, it is not open to the prosecutor to procure a fresh sanction and to institute proceedings upon such fresh sanction. The words "six months [574] from the date on which the sanction was given" must be taken to mean six months from the date on which it was given in the first instance, and not from any subsequent date on which the purport of the order might have been repeated.

The Munsif, who tried the suit out of which the application for sanction arose, refused to sanction any prosecution; the Munsif, who originally sanctioned the prosecution, was a different officer; while the Munsif who gave the fresh sanction was neither the Munsif who tried the case nor the Munsif who sanctioned the prosecution originally.

Semble.—Under these circumstances it is extremely doubtful whether the sanction was such as is contemplated by s. 195 of the Criminal Procedure Code.

[**Diss.**, 18 A. 358 (359) = 16 A.W.N. 113; 8 C.W.N. 797 (800); **Rel.**, 14 Cr. L.J. 213 = 19 Ind. Cas. 309 = 40 C. 584; **R.**, 4 O. C. 119 (121); **Rat.** Unrep. Cr. Cas. 803; **D.**, 5 Cr. L.J. 132 = 17 M.L.J. 153 (154) = 2 M. L. T. 24; L. B. R. (1893—1900) 377 (378).]

ONE Jagoo Lal (opposite party), on behalf of Rajah Hurbullabh Narain Singh, applied, some time in the year 1893, to the Munsif of Madhepura, for sanction to prosecute the petitioner, Darbari Mandar, for offences under ss. 193, 468 and 471 of the Indian Penal Code, alleged to have been committed by him in a suit tried by the Munsif some time in the previous year. He refused to grant the sanction, but upon appeal, a further enquiry was ordered, and sanction was ultimately granted by the Munsif's successor in office on the 10th of March 1894. Against this order an appeal was preferred to the District Judge, and on the matter coming up before the High Court, the order was affirmed, it being held by the High Court that, notwithstanding his original refusal, the Munsif had jurisdiction to grant sanction subsequently upon fresh materials. The order of the High Court was dated 16th August 1894, and on the

* Criminal Revision No. 85 of 1895, against the order passed by F. W. Badcock, Esq., Sessions Judge of Bhagulpore, dated the 15th of February 1895.

28th September Jagoo Lal instituted proceedings before the Deputy Magistrate of Madhepura against the petitioner, Darbari Mandar, but he was discharged on the 30th of October 1894, on the ground that, when the proceedings were instituted, more than six months had elapsed since the date of the sanction, *viz.*, 10th of March 1894.

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Thereupon Jagoo Lal, on the 28th of November, applied to the successor of the Munsif who had granted the sanction on the 10th of March, for a fresh sanction, which was granted on the 1st of December. The Deputy Magistrate, however, who had discharged the petitioner, Darbari Mandar, on the 30th of October, was of opinion that he could not make further enquiry into the matter, unless he was ordered to do so by the District Magistrate, and **[575]** accordingly he made a reference to that officer. The District Magistrate, on the 22nd of December, made the following order :—"I think it very doubtful that s. 195 (Criminal Procedure Code) can be evaded by the grant of a fresh sanction. If this were permissible the rationale of the limitation, *interest rei publicœ ut finis sit litium*, would disappear."

Against this order Jagoo Lal applied to the Sessions Judge, who, on the 15th of February 1895, directed the District Magistrate, by himself or by some other Magistrate, to make further enquiry into the matter. This rule was obtained to show cause why both the order of the Munsif granting fresh sanction on the 1st of December 1894 and the order of the Sessions Judge of the 15th of February 1895 directing further enquiry should not be set aside.

Mr. *P. L. Roy*, Babu *Amarendra Nath Chatterji* and Babu *Bidhu Bhusan Ganguli*, appeared in support of the rule on behalf of the petitioner.

The Advocate-General (Sir *Charles Paul*) and Babu *Jogendro Nath Ghose*, appeared to show cause on behalf of the opposite party.

Mr. *P. L. Roy.*—The order of the Sessions Judge is *ultra vires*. He had no jurisdiction under s. 437 of the Criminal Procedure Code to review the order of the District Magistrate, who had refused to order a further enquiry. Under that section the Sessions Judge and the District Magistrate have concurrent powers, but that does not mean that where the parties have been to one of these officers and failed to obtain what they prayed for, they are at liberty to go to the other officer and appeal against that order. If the Sessions Judge thought that the District Magistrate's order was bad, he should have referred the matter to the High Court under s. 438, see *Queen-Empress* v. *Shere Singh* (1) and *Hiraman De* v. *Ram Kumar Ain* (2).

The Munsif had no authority to grant a second sanction after the expiration of six months from the date of the original sanction. There is no provision for such a course in s. 195 of the Criminal Procedure Code. That section expressly says that a sanction under it shall remain in force only for six months, and the reason **[576]** for the rule is that a person shall not be at liberty to procure sanction from the Court, and then to keep it pending *in terrorem* over the head of the accused for an indefinite period. And this would be nullified, if a person were at liberty to apply for fresh sanction over and over again every six months. No explanation was given for the omission to commence proceedings within six months, nor any special grounds shown why a fresh sanction should be given : see *Jogdeo Singh* v. *Harihar Pershad Singh*(3).

(1) 9 A. 362. (2) 18 C. 186. (3) 11 C. 577.

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The Advocate-General (Sir *Charles Paul*) showing cause:—The Sessions Judge had power to order a further enquiry under s. 437 of the Criminal Procedure Code, inasmuch as the District Magistrate had not passed any order, he merely expressed an opinion. The case of *Hiraman De* v. *Ram Kumar Ain*(1), referred to by the other side, has no application. In that case it was merely held that the District Magistrate was not competent to refer to the High Court under s. 438 a case decided by the Sessions Judge on appeal.

It is competent for a Court which granted sanction for a prosecution under s. 195 of the Criminal Procedure Code to give a fresh sanction, if the one previously granted has expired by effluxion of time. It has been so held in the case of *Gulab Singh* v. *Debi Prasad*(2).

The judgment of the High Court (PETHERAM, C.J. and BEVERLEY, J.) was as follows:—

JUDGMENT.

The facts out of which this rule arises are as follows: One Jagoo Lal, on behalf of Rajah Hurbullab Narain Singh, applied in the year 1893, to the Munsif of Madhepura, for sanction to prosecute the petitioner, Darbari Mandar, for perjury and forgery, alleged to have been committed by him in a suit tried by the Munsif in the previous year. Sanction was at first refused, but upon appeal to the higher authorities, a further enquiry was ordered, and sanction was ultimately granted by the Munsif's successor on 10th March 1894.

Against this order an appeal was preferred both to the District Judge and to this Court, but the order was affirmed, it being held **[577]** by this Court that, notwithstanding his original refusal, the Munsif had jurisdiction to grant sanction subsequently upon fresh materials.

The order of this Court was dated 16th August 1894, and on the 28th September, Jagoo Lal instituted proceedings before the Deputy Magistrate of Madhepura. The petitioner, Darbari Mandar, was accordingly arrested, but was discharged on October 30th, on the ground that, when the proceedings were instituted (28th September), more than six months had elapsed since the date of the sanction (10th March).

Thereupon, on the 28th November, Jagoo Lal applied to the successor of the Munsif who had granted the sanction of 10th March, for a fresh sanction to prosecute; and fresh sanction was granted on 1st December. The Deputy Magistrate, however, who had discharged the present petitioner on 30th October was of opinion that he could not make further enquiry into the matter unless he was ordered to do so by the District Magistrate, and he accordingly made a reference to that officer on the 15th December.

On the 22nd December the District Magistrate made the following order: "I think it very doubtful that s. 195 can be evaded by the grant of a fresh sanction. If this were permissible, the rationale of the limitation (*interest rei publicœ ut finis sit litium*) would disappear."

Jagoo Lal then made an application to the Sessions Judge, who, on the 15th February 1895, directed the District Magistrate, by himself or by some other Magistrate, to make further enquiry into the matter.

The present rule was then obtained from this Court to show cause why both the order of the Munsif granting fresh sanction on 1st December 1894 and the order of the Sessions Judge of 15th February 1895 directing further enquiry into the charges of perjury and forgery, should not be set aside.

(1) 18 C. 186. (2) 6 A. 45.

It is contended, in the first place, that the Sessions Judge had no jurisdiction to override the District Magistrate's order made under s. 437 of the Code, and, in the second place, that, under the terms of s. 195, it was not competent to the Munsif to grant a fresh sanction to prosecute after the sanction had ceased to operate by efflux of time.

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[578] The first point was taken before the Sessions Judge, but that officer was of opinion that he had jurisdiction, inasmuch as the District Magistrate had not made any order under s. 437 of the Code. We think it clear, however, that the District Magistrate did decline to order a further enquiry, and that his doing so must be taken to be an order under that section. Both the District Magistrate and the Sessions Judge are competent, under s. 437, to order a further enquiry, but when a further enquiry has been refused by one of these officers, we think it would be an unseemly proceeding, to say the least, that it should be ordered by the other; if the Sessions Judge was of opinion that the order of the District Magistrate was wrong, it was open to him to refer the matter to this Court under s. 438, but we are clearly of opinion that he had no jurisdiction himself to review an order made by the District Magistrate under s. 437.

As, however, it would have been competent to the Sessions Judge to report the District Magistrate's proceeding for the orders of this Court, and as it is open to him to do so now, we are of opinion that we ought to decide the second point raised in the rule, namely, whether, when a sanction granted under s. 195 has expired by effluxion of time before any prosecution under it has been commenced, it is open to the prosecutor to procure a fresh sanction and to institute proceedings upon such fresh sanction. In the case of *Jogdeo Singh* v. *Harihar Pershad Singh* (1) this contention was raised before a Bench of this Court, but that Bench thought it unnecessary to express any opinion upon the point, because, even assuming that the Munsif who granted the fresh sanction in that case had power to grant it, the Court held that he had not exercised a sound discretion in granting it. In the matter of the petition of *Gulab Singh* v. *Debi Prasad*(2) Straight, Officiating C. J., sitting alone, expressed the opinion that a fresh sanction could be given, if that already granted had expired by effluxion of time, but that opinion was a mere *obiter dictum*, as it was held that the proceedings under the first sanction given in that case were still pending. The point has, therefore, not been decided, so far as we are aware, and it is, [579] therefore, necessary to consider the terms and the intention of the section.

Section 195 is included in chap. XV of the Code, headed *Of the Jurisdiction of the Criminal Courts in Inquiries and Trials*, and it falls under the heading *B*, *Conditions requisite for Initiation of Proceedings*. Omitting those portions which are irrelevant to the present question, it runs as follows:—

"No Court shall take cognizance . . . . (*b*) of any offence punishable under ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, or 228 of the same Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint, of such Court or of some other Court to which such Court is subordinate; (*c*) of any offence described in s. 463 or punishable under ss. 471, 475, or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding,

(1) 11 C. 577.

(2) 6 A. 45.

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except with the previous sanction, or on the complaint, of such Court or of some other Court to which such Court is subordinate."

. . . . . .

"Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; *and no such sanction shall remain in force for more than six months from the date on which it was given.*"

. . . . . .

Now what this section expressly says in this: That in respect of the offences described in cls. (*b*) and (*c*), no Criminal Court shall take cognizance of them, unless the Court concerned in the offence shall either itself institute the proceedings or sanction their institution, and that where the Court does not itself institute the proceedings but sanctions their institution, the proceedings must be instituted within six months from the date of the sanction. As regards a complaint by the Court itself, no period of limitation is prescribed, and it is clear that the Court may proceed, either by way of complaint or under the provisions of chap. XXXV at any time. But where the Court delegates the duty of prosecuting to another, when it merely sanctions the prosecution, **[580]** then the plain intention of the section seems to be that the proceedings must be initiated within six months from the date of sanction; and the reason of this rule seems to be the very wholesome one that a private prosecutor shall not be at liberty to procure sanction to prosecute from the Court and then to keep the sanction pending *in terrorem* over the head of the accused indefinitely.

Now, if this is the true meaning of the section, it seems to us that this wholesome provision of the law is entirely nullified, if a person is at liberty to apply for fresh sanction over and over again every six months. If that were to be allowed, the Court would, in our opinion, be lending its sanction to enable a private prosecutor to do the very thing which the law is intended to prevent. And this, moreover, can only be effected by a fictitious use of the word sanction. If the Court sanctions a prosecution, it sanctions it once for all; there may be a fresh order written on another piece of paper after six months, but that is not a fresh sanction, it is only the repetition of the original sanction; and when the section speaks of "six months from the date on which the sanction was given," we think it must be taken to mean six months from the date on which it was given in the first instance, and not from any subsequent date on which the purport of the order may have been repeated.

That being our view of the section, the rule must be made absolute to set aside the order of the Sessions Judge and any proceedings that may have been taken under the so-called fresh sanction.

Another important point arises in this case, but as it has not been argued, we feel it unnecessary to do more than notice it. It is to be observed that the Munsif who actually tried the suit out of which the application for sanction arose, refused to sanction any prosecution; the Munsif who originally sanctioned the prosecution was a different officer; while the Munsif who gave the fresh sanction was neither the Munsif who tried the case nor the Munsif who sanctioned the prosecution originally.

Under the circumstances, we think it extremely doubtful whether the sanction was such as is contemplated by s. 195, Criminal Procedure Code.

S. C. B. *Rule made absolute.*

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[581] CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

CORPORATION OF CALCUTTA *v.* STANDARD MARINE INSURANCE COMPANY.* [1st April, 1895.]

Calcutta Municipal Consolidation Act (*Bengal Act II of* 1888), s. 87 *and the second schedule —Insurance Companies registered in England and carrying on business through agents in Calcutta, liability of, to pay the Municipal License Tax.*

The Standard Marine Insurance Company being an insurance company which is registered in England and carries on insurance business through the agency of a firm of general merchants in Calcutta is not liable to pay the license tax imposed by s. 87 and the second schedule of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888).

The business of insurance is not one of the occupations mentioned in the second schedule to the Act, and s. 87 only imposes the tax upon persons who exercise some or one of the professions, trades or callings mentioned in that schedule. The words of the section limit its operation to "persons," which expression includes joint-stock companies who exercise the particular occupations prescribed in the schedule

The Standard Marine Insurance Company is not liable to be taxed, as keepers of a place of business, under class VI of the second schedule of the above Act, because its business is carried on in Calcutta by its agents at their own offices, and the Company has no place of business of its own at all in Calcutta.

[**Appl.**, 21 M 5; **R** , 24 M. 205 (212) ; **D.**, 25 C. 483 (487).]

THIS was a reference made, under s. 432 of the Code of Criminal Procedure, by the Chief Presidency Magistrate of Calcutta. The facts were as follows :—

Messrs. Gladstone, Wyllie and Company, merchants in Calcutta, have been, since March 1892, and still are, the agents in Calcutta of the Standard Marine Insurance Company, Limited, a joint stock company registered, and having its principal office or place of business in England, and having a capital of £500,000, out of which £100,000 have been paid up. During the official year 1893-94, *i.e.*, between the 1st of April 1893 and the 31st of March 1894, Messrs. Gladstone, Wyllie and Company, as the agents of and for and on behalf of the defendant Company, performed all acts in connection with their insurance business, but **[582]** during the same period, no license was applied for or taken out on behalf of the defendant Company. On these facts the Magistrate held that the defendant Company was liable to assessment under s. 87 and class I of the second schedule of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888), and imposed a fine of Rs. 300 under s. 90 of the Act. But, at the request of the defendant Company, he made a reference to the High Court under s. 432 of the Code of Criminal Procedure. The question submitted for the opinion of the High Court, upon the facts as found above, being :—

" Is the Standard Marine Insurance Company, Limited, liable to assessment under s. 87 of Bengal Act II of 1888, and the second schedule to the same Act, classes I and II, and, if so, under which of the two classes ? "

The Advocate-General (Sir *Charles Paul*) and Mr. *O'Kinealy* appeared on behalf of the Corporation of Calcutta.

*Criminal Reference No. 2 of 1895, made by T.A. Pearson, Esq., Chief Presidency Magistrate, Calcutta, dated the 28th February 1895.

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Mr. *Phillips* appeared on behalf of the Standard Marine Insurance Company.

Mr. *Phillips*.—Under the provisions of Part II of chap. III of the Calcutta Municipal Act (Bengal Act II of 1888), joint stock companies are not liable to take out licenses. Sections 87, 89, 93, of the Act contemplate individuals. The words "male persons" in s. 91 cannot include corporations and companies; they cannot have sex. The General Clauses Act (Bengal Act V of 1867) does not help the matter, because s. 13 of the Calcutta Municipal Act distinctly lays down for what purposes the word "person" in that Act is to include a company. Schedule II of the Act seems to have been compiled independently of the words of the sections. It may be said that the word "person" in s. 87 has been extended by the indications in sch. II of the Act, so as to include "companies;" but that extension, if any, has also been restricted by the same section. Only such companies as "exercise in Calcutta any of the professions, trades or callings prescribed in the second schedule of the Act, shall take out a license annually." If it be said that, under the second schedule of the Act, all joint-stock companies, whether carrying on any of the professions, trades or callings mentioned in the schedule, or not, are included, then all benevolent **[583]** societies and associations, not for profit, formed under s. 26 of the Indian Companies Act, would be liable to take out licenses. Surely the Legislature did not intend that.

Then, again, from the words used in the schedule, *viz.*, "the paid-up capital of which amounts to ten lakhs of rupees or upwards," it is evident that companies, other than Indian, were not intended to be included. If it were, then fluctuations in the rate of exchange would affect the liability to take out a license. The Standard Marine Insurance Company carry on their business here through agents who have taken out their license. Can it be said that the agents, as well as the principals, should pay the tax to the Municipality? There are persons who are merchants as well as agents for foreign companies. Are they to take out a license themselves as well as for their principals? The share of the advantages afforded by the Municipality is enjoyed by the agents alone and not by the principals. The second schedule, clause (2) itself provides that "no person shall be required to take out more than one personal license." [PETHERAM, C.J. —Mere agency is not within the schedule. In class II the liability depends, not on the capital, but on the value of the place of business.] Yes, the place of business is the leading feature. The Company has no separate place of business here. *Erchsen* v. *Last* (1), *Wearle & Co.* v. *Colquhoun* (2), *Colquhoun* v. *Brooks* (3), *Grainger & Son* v. *Gough* (4). The above cases are cases under the Income Tax Act (16 & 17 Vict., c. 34), and have no application. Income tax lvied by the Government is of a nature very different from license tax levied by the Municipality. Then, again, if the principle of "representation and taxation must go together," be applied to the Act, we find that ss. 4, 7, 8, 12, 13, 14 and other sections dealing with the constitution of the Corporation, all point to the persons affected being within the local limits of the Municipality. Section 24 evidently has not within its purview foreign companies. Thirty days and seven days won't be enough in the case of foreigners residing abroad. See also s. 418 dealing with prosecutions, and s. 434 prescribing the mode of service of notice. They **[584]** all point to the persons

(1) L. R. 8 Q. B. D. 414
(2) L. R. 20 Q. B. D. 753.
(3) L. R. 14 A. C. 493.
(4) L. R. (1895) 1 Q. B. 71.

affected being within the local limits of the Municipality and not to foreigners.

The *Advocate-General* on behalf of the Corporation.—The Insurance Company is carrying on trade in Calcutta as contemplated by s. 87 and the second schedule of the Calcutta Municipal Act (Bengal Act II of 1888), and it is liable to take out the license. [PETHERAM, C. J.—Joint-stock companies are not liable to pay the license tax, unless they carry on one of the trades mentioned in the second schedule. Take the case of an underwriter; this calling is not mentioned in the schedule. The Legislature has not made use of any general words; only certain trades are specified. An insurance company carries on a business, not a trade or calling.] In the schedule only *persons* are mentioned, and not *trades* or *callings*. Professions, trades and callings are the three kinds of business; there cannot be a fourth kind. Section 87 has been expanded by the second schedule. If the Insurance Company carries on business here in Calcutta, it is bound to pay the license tax. See the Income Tax Act (13 and 14 Vict., c. 34). An underwriter cannot claim exemption under that Act.

The meaning of the word "person" as given in s. 13 of the Municipal Act, has nothing to do with the present case. Under the provisions of s. 1 of the General Clauses Act V of 1867, "persons" include companies.

In the second schedule the words used are "the paid-up capital of which *amounts* to ten lakhs of rupees or upwards." The word "amounts" has been advisedly used; it means "is equivalent to." Companies with capital in foreign coin are intended to be included. Lastly, I submit that the defendant Company is liable to be taxed, as keepers of a place of business, under class VI of the second schedule.

The judgment of the Court (PETHERAM, C.J. and BEVARLEY, J.) was as follows:—

JUDGMENT.

The question we have to consider is, whether an insurance company, which is registered in England, with a paid-up capital of £100,000, and which issues policies and carries on the general business of insurance in Calcutta, through the agency of a firm of general merchants there, is liable to the license tax imposed by s. 87 of the Calcutta Municipal Consolidation **[585]** Act. We think it is not, and our reason for doing so is, that the business of insurance is not one of the occupations mentioned in the second schedule to the Act; and s. 87 only imposes the tax upon persons who exercise some or one of the professions, trades, or callings mentioned in it. The words of the section are: "Every person who shall exercise, in Calcutta, any of the professions, trades or callings prescribed in the second schedule, shall annually take out a license, and shall pay for the same such sum as in the second schedule is mentioned." The second schedule is divided into seven classes, in each of which a duty of a particular amount is imposed. The first is Rs. 200: Every joint-stock company the paid-up capital of which amounts to ten lakhs of rupees or upwards. The second Rs. 100: Every other joint-stock company and the persons who carry on a number of specified trades or businesses, and who do so in premises of a certain monthly value. Classes III, IV and V, Rs. 50, Rs. 25 and Rs. 12, include certain professions and trades without reference to the value of the premises where they are carried on, and certain other trades and businesses carried on in premises of a certain monthly value. Class VI, Rs. 4, includes every keeper of a shop, or place of business, not included in any

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other class, and certain brokers and pedlars. Class VII, Re. 1, includes all itinerant dealers hawking goods for sale in baskets or trays. The business of insurance is nowhere mentioned in the schedule. There are no general words to be found in it which are wide enough to include such a business. The arguments for the Corporation are, that class I includes all joint-stock companies who carry on business in Calcutta with a paid-up capital of ten lakhs of rupees, whatever their business may be, and although it may be of a nature which would not require a licenso if it were carried on by an individual, and that, if that is not the case, a person or a company who carries on the business of insurance, or, n fact, any business in Calcutta, is liable to a tax of Rs. 4 at all events, as the keeper of a place of a business, under class VI. We do not think that these arguments can prevail. The object of the classes is to bring such traders and professional persons who are to take out licenses into groups or classes, so that it may not be necessary to repeat [586] the amount of the tax as many times as there are occupations in respect of which the tax is to be paid; but there is nothing in the schedule to extend the operation of the section, which is limited in terms to the professions, trades or callings prescribed in the schedule, unless the fact that the business is carried on by a company, makes the business one of those prescribed in the schedule, whatever its nature may be. We do not think it is possible to put such a construction on a section, the words and meaning of which are, we think, clear; the words limit its operation to "persons," which expression, of course, includes joint stock companies, who exercise the particular occupations prescribed in the schedule, and we think we should be doing violence to the plain words and meaning of the Act if we were to extend it to a company, because companies are placed in separate classes in the schedule, though it did not, in fact, carry on one of the businesses prescribed in it. Such a construction would be to tax a company, because it is a company, and not because it carries on one of the taxable businesses. The only other question is whether this company is liable to be taxed under class VI as the keepers of a place of business. The short answer to this argument is that they do not keep any place of business in Calcutta, as the case shows that their business here is carried on by their Agents, Messrs. Gladstone, Wyllie & Company, at their own offices, and that the company have no place of business of their own here at all. Our answer to the reference is that the Standard Marine Insurance Company, Limited, are not liable to assessment under s. 87 of Bengal Act II of 1888 and the second schedule to the same Act.

S. C. B.

22 C. 586.

1895 APRIL 1.

CRIMINAL REFERENCE.

22 C. 586.

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

SHIB NATH CHONG (*Complainant*) v. SARAT CHUNDER SARKAR (*Accused*).* [1st April, 1895.]

Sanction for prosecution—Criminal Procedure Code (*Act X of* 1882), ss. 195 *and* 560 *—Sanction to prosecute and award of compensation—Imprisonment in default of payment of compensation.*

The complainant was directed to pay Rs. 50 as compensation to the accused, or, in default, to suffer simple imprisonment for one month, under [587] s. 560 of the Code of Criminal Procedure, and sanction was also granted to prosecute him for offences under ss. 211 and 193 of the Penal Code. *Held*, that if the Magistrate thought that this was a case in which a prosecution under ss. 211 and 193 of the Penal Code should be sanctioned, he ought not to have taken action under the provisions of s. 560 of the Code of Criminal Procedure.

Held also, that the order for imprisonment in default of payment of the compensation awarded was illegal.

Ramjeevan Koormi v. *Durga Charan Sadhu Khan* (1) followed.

[**Diss.**, 21 M. 237 (239) = 2 Weir. 312 ; 18 P. R. 1901 (Cr.) = 100 P.L.R. 1901 ; **F.**, 26 C. 181 (183) ; 13 P. R. 1896 (Cr.); **R** , 30 C. 123 (130) (**F.B.**) ; 15 C P. L. R. 194 (195); 30 P. W. R. 1907 (Cr.).]

THIS was a reference under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Mymensingh.

The following facts appear from the letter of reference :—

On the 14th of November 1894 Shib Nath Chong, the complainant, filed a complaint in the Court of the Deputy Magistrate, charging Sarat Chunder Sarkar, a head-constable of police, and eighteen other persons named by him, with offences under ss. 144, 148, 447, 443, and 426 of the Indian Penal Code. The District Magistrate made over the case to the Joint Magistrate for disposal. The only accused summoned was the head-constable, Sarat Chunder Sarkar. He admitted that the complainant's house had been entered, but alleged that this was done for the purpose of arresting one Kama Sheik. The Joint Magistrate found the complaint to be "wilfully and maliciously false," and acquitted the accused under s. 245 of the Code of Criminal Procedure. He further sanctioned the prosecution of the complainant under s. 211, and also under s. 193, of the Indian Penal Code, and also directed the complainant to pay to the accused Rs. 50 as compensation under s. 560 of the Code of Criminal Procedure. The complainant applied to the Sessions Judge against the order of the sanction for prosecution and against the order for the payment of compensation. The Sessions Judge revoked the sanction for prosecution, and, with regard to the order awarding compensation, reported to the High Court, submitting "that the order for the payment of compensation was also not justified, and should be set aside." No one appeared at the hearing of the reference.

The judgment of the High Court (PETHERAM, C.J. and BEVERLEY, J.) was as follows :—

JUDGMENT.

[588] This is a reference from the Sessions Judge of Mymensingh, recommending that an order of the Joint Magistrate in the case of Shib Nath

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* Criminal Reference No. 69 of 1895, made by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 11th and 12th of March 1895.

(1) 21 C. 979.

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Chong *v.* Sarat Chunder Sarkar, head-constable, by which the complainant is directed to pay Rs 50 as compensation to the accused under s. 560, Code of Criminal Procedure, or, in default, to suffer simple imprisonment for one month, be set aside. It appears that the Joint Magistrate also sanctioned the prosecution of the complainant for instituting a false charge under s. 211, Indian Penal Code, but that sanction has been revoked by the Sessions Judge.

We are of opinion that it was never intended that recourse should be had to the provisions of s. 560, Code of Criminal Procedure, in a case in which the trying Magistrate is of opinion that the complaint was wilfully and maliciously false, and that the complainant should be prosecuted for an offence under s. 211, Indian Penal Code. If, therefore, the Joint Magistrate thought that this was a case in which a prosecution for an offence under s. 211, Indian Penal Code, should be sanctioned, he ought not to have taken action under the provisions of s. 560, Code of Criminal Procedure. To sanction or direct a prosecution, *and also* to proceed to award compensation under s. 560, Code of Criminal Procedure, was, we think, an improper exercise of his discretion. *Queen* v. *Rupan Rai* (1). By such action the Joint Magistrate was, in point of fact, prejudging the issue of the charge which he was submitting for trial.

In the present case the Sessions Judge has set aside the sanction to prosecute, and we agree in the reasons which he has given in his judgment for so doing; and we think that, for the same reasons, we must set aside the order made under s. 560, Code of Criminal Procedure.

It is admitted that the head-constable, with a *posse* of people, did enter the complainant's homestead, and do considerable mischief to his property, and it is not shown that the head-constable was justified in so doing, even though his object may have been the arrest of one Kama Sheik. It is, therefore, by no means clear that the complainant had not good cause to be aggrieved by the conduct of the police.

[589] The order for imprisonment in default of payment of the compensation awarded is, we think, illegal. See the case of *Ramjeevan Koormi* v. *Durga Charan Sadhu Khan* (2).

We set aside the Joint Magistrate's order, under s. 560, Code of Criminal Procedure, and direct that the sum of Rs. 50, if realized from the complainant, be refunded to him.

S. C. B. *Order set aside.*

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22 C. 589.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

RASUL JEHAN BEGUM (*Defendant*) *v.* RAM SURUN SINGH AND OTHERS (*Plaintiffs*).* [19th February, 1895.]

Hindu Law, Widow—Hindu widow, Custom of re-marriage of—Forfeiture—Decree granted on a different cause of action.

A Hindu widow, on re-marriage, forfeits the estate inherited from her former husband, although, according to custom prevailing in her caste, a re-marriage is

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* Appeal from Appellate Decree No. 1169 of 1893, against the decree of G. G. Dey, Esq., District Judge, Shahabad, dated the 21st of April 1893, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that District, dated the 25th of August 1892.

(1) 6 B. L. R. 296. (2) 21 C. 979.

permissible. *Murugayi* v. *Viramakali* (1), followed ; *Matungini Gupta* v. *Ram Button Roy* (2), referred to ; *Har Saran Das* v. *Nandi* (3), dissented from. 1895 FEB. 19. APPELLATE CIVIL. 22 C. 589.

Plaintiffs' suit was that they were co-owners with *B* of a certain property as members of a joint family under the Mitakshara law ; that after *B*'s death, a $3\frac{1}{2}$ annas' share of the property was registered under the Land Registration Act in the name of *A*, the mother of *B*, although the plaintiffs were the owners in possession, and *A* was entitled only to maintenance ; that a gift was made of $1\frac{1}{2}$ annas' share by *A* to her daughter and daughter's son, without right, and the donees having granted a *zuripeshgi* lease in respect of that share, the *zuripeshgidars* took possession thereof. The plaintiffs, accordingly, prayed for recovery of possession by establishment of their alleged right of ownership, or, in the alternative, for a declaration that they were reversionary heirs to the estate of *B*, and, as such, not bound by the gift and the *zuripeshgi* lease aforesaid. *A* died during the pendency of [590] the suit. It was found that plaintiffs were not co-owners with *B* as alleged ; but that, as reversionary heirs, they became entitled to possession upon *A*'s death, after the institution of the suit. *Held*, that as the plaintiffs had claimed to recover possession in the suit, and as *A* died before the case was taken up for trial, the plaintiffs were entitled to the relief, although they asked it on a ground different from that on which they recovered judgment.

[Diss., 22 B. 321 (329); F., 15 Ind. Cas. 602=12 M.L.T. 158 ; 8 C.L.J. 542 ; R., 24 B. 89 (94) ; 38 C. 362 (371) = 13 C.L.J. 558 = 15 C.W.N. 579 = 10 Ind. Cas. 69 (73) ; 26 M. 143 (149) = 12 M.L.J 197 ; 14 C.W N. 346 = 5 Ind. Cas. 710; 17 Ind. Cas. 133 (135) = 8 N.L.R. 128 ; 15 C.P.L.R. 89 (91) ; 30 A. 161 = 6 A.L.J. 107 = 1 Ind. Cas. 761.]

THE material allegations in the plaint in this case were, that the plaintiffs, and one Lalu Ram and his son Bhima Ram, were members of a joint family governed by the Mitakshara law, and 7 annas of Mouza Dumri was their joint-family property ; that Lalu Ram died first and then died Bhima Ram, leaving him surviving his mother Akalo Koer and his widow Badamo Koer, both of whom lived in the joint family ; that, on the passing of the Land Registration Act (Bengal Act VII of 1876), a $3\frac{1}{2}$ annas' share was registered in the name of Akalo Koer to please her, but the plaintiffs remained as owners in possession ; that subsequently, in 1880, Akalo Koer executed a deed of gift of $1\frac{1}{2}$ annas' share in favour of her daughter and daughter's son (defendants Nos. 1 and 2) ; that they, in 1886, let out this share in *zuripeshgi-ticca* for a term of seven years ; and that the *zuripeshgidars* (defendants Nos. 4 and 5) took possession under the lease. The plaint then proceeded to state that Akalo Koer defendant No. 3) had only a widow's interest, to be maintained in the family, and she had no right to make the gift aforesaid, and that she had, in 1889, executed an *ikrarnama* in favour of the plaintiffs, acknowledging their ownership, and admitting that she had only a right of maintenance. The plaintiffs, under the above circumstances, prayed for the recovery of possession of the share with mesne profits, or, in the alternative, for a declaration that they were the reversionary heirs of Bhima Ram, and, as such, not bound by the deed of gift executed by defendant No. 3 and the *zuripeshgi* deed executed by the defendants Nos. 1 and 2.

The defendant No. 4, who is now represented by the appellant, in his written statement, denied the allegations made by the plaintiffs as regards joint family and joint possession, and averred that a $3\frac{1}{2}$ annas' share in the *mouza* was the self-acquired property of Lalu Ram ; that Bhima Ram having died during the [591] lifetime of his father, Akalo Koer succeeded to the property after Lalu Ram's death, and was still in possession thereof ; that the defendants Nos. 1 and 2 were the lawful heirs

(1) 1 M. 226. (2) 19 C. 289. (3) 11 A. 330.

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of Lalu Ram, and the gift in their favour and the *zuripeshgi* lease executed by them in favour of defendants Nos. 4 and 5 were valid transactions; and, furthermore, that Akalo Koer had, since the institution of this suit, sold 1½ annas' share to the defendant No. 4.

Akalo Koer, originally the defendant No. 3, died while the suit was pending in the Court of first instance.

The Subordinate Judge, in whose Court the suit was instituted, found, on evidence, that the allegations made by the plaintiffs as regards joint ownership were not true; but he found that Bhima Ram survived his father Lalu Ram and inherited his property; that after Bhima Ram's death, his widow Badamo Koer had succeeded to his estate, but as she took a second husband, she forfeited her rights as Bhima Ram's widow, and Akalo Koer, as mother, took possession of his estate. The Subordinate Judge held that, as Akalo Koer had died after the institution of this suit, the plaintiffs, as reversionary heirs, became entitled to a decree for possession of the share in question.

The District Judge, on appeal, observed that, in the present case, remarriage being allowed by the custom of the caste, Act XV of 1856, did not apply to it; but that the rule of forfeiture in that Act was based on the general principles of Hindu law, and even when a remarriage was permitted by custom, the widow by remarrying forfeited her interest in the first husband's estate. The District Judge concurred in the findings arrived at in the Court of first instance, and upheld the decree of that Court.

The defendant, Rasul Jehan Begum, appealed to the High Court.

Babu *Umakali Mukerjee* and Moulvie *Syed Mahomed Tahira*, for the appellant.

Moulvie *Mahomed Yusuf*, for the respondents.

Babu *Umakali Mukerjee*.—It is found in this case that there was a custom permitting remarriage of widows among the caste (Agarhari) to which Bhima Ram belonged. The provision of [592] forfeiture in Act XV of 1856, therefore, does not apply to this case. The case of *Har Saran Dass* v. *Nandi* (1) is in point. There is nothing in the Hindu law to divest the widow of her rights in her former husband's estate. The case of *Moniram Kolita* v. *Keri Kolitany* (2) supports my contention. The case of *Matungini Gupta* v. *Ram Rutton Roy* (3) is a ruling on a different point, and in the case of *Murugayi* v. *Viramakali* (4), it was found that there was a practice, or custom, among the Sudra castes of the Deccan, under which widows gave up their interest on remarriage. Here the custom found is in favour of remarriage. No custom has been found, or inquired into, whereby the widow forfeits her estate on remarriage. As Badamo Koer has not forfeited her interest, the present suit cannot succeed. Moreover, the plaintiffs claimed to recover possession, on the ground that they were members of a joint family with Bhima Ram. That ground has failed, and the plaintiffs are not entitled to a decree for possession in this suit. Akalo Koer was alive when the suit was brought, and there was no cause of action for recovery of possession. Treating the suit as declaratory it is barred by limitation.

Moulvie *Mahomed Yusuf*, for the respondents, was not called upon.

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(1) 11 A. 330.
(2) 5 C. 776=7 I.A. 115.
(3) 19 C. 289.
(4) 1 M. 226.

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JUDGMENT.

The judgment of the Court (GHOSE and GORDON, JJ.) was delivered by

GHOSE, J.—This was a suit for recovery of possession of certain properties covered by a deed of gift executed by one Mussamat Akalo Koer in favour of defendants 1 and 2 on the 9th March 1880, or, in the alternative, for a declaration that the said deed of gift was invalid and not binding on the plaintiffs. The plaintiffs claimed as reversionary heirs to the estate left by one Bhima Singh. They alleged that they and Bhima Singh formed members of a joint Hindu family governed by the Mitakshara law, and that, after Bhima Singh's death, they were in possession of the entire joint-family property, but that Mussamat Akalo, the mother of Bhima Singh, unlawfully executed the said deed of gift in favour of defendants 1 and 2. The plaintiffs further stated that the said [593] lady had executed an *ikrarnama* in September 1889 in favour of the plaintiffs, admitting their title to the property in question. The suit, we may here mention, was commenced in the lifetime of Mussamat Akalo, but she died pending the suit and before the trial came on, and one of the questions that seems to have been raised in the Court below was whether the plaintiffs could succeed in recovering possession of the property in suit, the widow having been alive upon the date of the institution of the suit.

The defendant appellant claimed under a *zuripeshgi* lease from defendants 1 and 2, and she pleaded that neither Bhima Singh nor Lalu Ram, his father, formed members of a joint Hindu family with the plaintiffs; that Bhima Singh had predeceased Lalu Ram, that, upon Lalu Ram's death, the property devolved upon his widow Mussamat Akalo; and that the said lady was justified in making the deed of gift of the 9th March 1880 in favour of defendants 1 and 2.

Both the Courts below seem to have found that the plaintiffs and Bhima Singh did not form members of a joint Hindu family, but that, upon Lalu Ram's death, the property devolved upon Bhima Singh, his son, and that Mussamat Akalo was not justified in executing the deed of gift in favour of defendants 1 and 2. It would, however, appear that, at the trial in the Court of first instance, a question was raised, apparently for the first time, by the defendant, to the effect, whether the plaintiffs could succeed, because, assuming that Bhima Singh survived Lalu Ram, he was succeeded by his widow, Mussamat Badamo Koer. It appeared that this person, after succeeding to the estate of Bhima Singh, remarried, and, upon this remarriage taking place, the estate went into the hands of Mussamat Akalo; for that is the way in which we read the judgment of the Munsif, who held that, upon Mussamat Badamo Koer taking a second husband, she lost all rights to the estate left by Bhima Singh; and that his mother, therefore, was in possession under the Hindu law as his next heir; and that, after her death, the plaintiffs were entitled to succeed. Upon the question that was raised whether the plaintiffs could recover in this action, the suit having been instituted at a time when Mussamat Akalo was alive, both the Courts were of opinion that, inasmuch as before the decree was [594] pronounced in the suit, the plaintiffs were entitled to succeed to the estate in the possession of Mussamat Akalo, there was no reason why they should be driven to a second suit. And the learned District Judge, with reference to the question as to the right of Mussamat Badamo Koer, the widow of Bhima Singh, which seems to have been also raised before him in appeal, says as follows: "In the present case remarriage

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is allowed by the custom of the caste, and I do not understand Act XV to apply to such cases. But it seems to me that, as remarked by Mr. Justice Wilson in *Matungini Gupta* v. *Ram Rutton Roy* (1), the rule of forfeiture in Act XV is based on the general principle of Hindu law; and that, even when a second marriage is permitted by custom, it entails forfeiture of all interest in the first husband's estate. It is clear, in the present case, that this was recognised, as Bhima's widow has been excluded from the inheritance for more than twenty years and has advanced no claim to it." In the result, the Courts below decreed the plaintiffs' suit for recovery of possession of the property in question.

On second appeal, by the defendant, it has been contended before us, in the first instance, by the learned vakil on her behalf, that, according to the custom prevailing in the caste to which the plaintiffs' family belongs, remarriage of widows being permissible, Mussamat Badamo Koer did not in law forfeit her interest in her husband's estate, which she took upon his death. With reference to this point, it seems to us, in the first place, that the question does not properly arise in the case, because, as I have already pointed out, it was no part of the defendant's case that Badamo Koer succeeded Bhima Singh in this property as his widow, and that Badamo Koer continued, even after her remarriage, to hold the estate, or to be entitled to that estate at the time of the institution of the suit. On the other hand, her case was that Bhima Singh had predeceased Lalu Ram, and he had, therefore, no title at all to the property in question. And referring to the judgments of both the Subordinate Judge and the District Judge, it seems to us that, although Badamo Koer did succeed to the estate as the widow of Bhima Singh, still, upon her remarriage, she ceased to have any connection with that estate; and that, upon that event taking place, it went **[595]** into the hands of Mussamat Akalo as the nearest heiress to her son Bhima Singh. If, however, it be necessary for us to express any opinion upon the question of law that has been raised before us, we think it would be sufficient for us to refer to the case of *Murugayi* v. *Viramakali* (2), in which the learned Judges, who decided it, upon this question expressed themselves as follows: "Now the principle on which a widow takes the life interest of her deceased husband, when there is no male heir, is that she is a surviving portion of her husband, and where the rule as to remarriage is relaxed and a second marriage permitted, it cannot be supposed that the law which these castes follow would permit of the remarried widow retaining the property in the absence of all heirs for the continuance of the fiction upon which the right to enjoyment is founded;" and that is also the view that was expressed by Wilson, J., in the case of *Matungini Gupta* v. *Ram Rutton Roy* (1), and we may say that we entirely agree in it. It seems to us that, upon the remarriage taking place, the widow, though, according to the custom prevailing in her caste, a remarriage was permissible, forfeited the estate, which was but a widow's estate that she had inherited from her husband, and that the property devolved upon Mussamat Akalo as the legal heiress of her son Bhima Singh.

Another point that has been raised before us by the learned vakil is as to whether the plaintiffs were entitled to a decree for possession in this case, the suit having been instituted during the lifetime of Mussamat Akalo. No doubt the ground upon which the plaintiffs based their action

(1) 19 C. 289 (292). (2) 1 M. 226.

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was a different one from that upon which they have recovered judgment in this case. They sued upon the ground, as I have already mentioned, that they and Bhima Singh formed members of a joint Hindu family; but it would appear that all the issues which bore upon the respective cases which the parties sought to make in the first Court were raised in that Court; and it transpired at the trial that, although Bhima Singh did not form a member of the joint Hindu family with the plaintiffs, still the deed of gift, executed by Mussamat Akalo in March 1880, was a deed which she was not justified in executing—a deed which was altogether inoperative, so far as the plaintiffs' reversionary heirs were concerned. It will be remembered [596] that the suit, as brought in the first Court, was not a suit for a declaratory relief only but a suit for that relief as also for possession. It seems to us that the plaintiffs having claimed for recovery of possession in the suit, and Mussamat Akalo having died previous to the time when the case was taken up for trial, there is no reason why the plaintiffs should be driven to a separate suit for recovery of the same relief which they asked for in this suit, but which they asked upon a ground somewhat different from that upon which they have been allowed to recover judgment. We think, upon the whole, that there are no sufficient reasons for our interference with the judgment of the Court below, and we accordingly dismiss this appeal with costs.

We may add that our attention was called by the learned vakil for the appellant to the case of *Har Saran Das* v. *Nandi* (1), in the Allahabad Court, in which the learned Judges seem to have expressed themselves to the effect that a widow, belonging to a caste in which remarriage is permitted, does not, upon her second marriage, forfeit her interest in the estate, and that s. 2 of Act XV of 1856 does not apply to such a widow. It does not appear that the true position of a Hindu widow inheriting the estate of her husband was considered in that case. That was considered in the case of *Murugayi* v. *Viramakali* (2) and *Matungini Gupta* v. *Ram Rutton Roy* (3) to which we have already referred.

S. C. C. *Appeal dismissed.*

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CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Beverley.

DHARAM CHAND LAL (*Peititioner*) *v.* QUEEN-EMPRESS (*Opposite-party*).* [6th March, 1895.]

Penal Code (*Act XLV of* 1860 (s. 186—*Nazir's power of delegation—Civil Procedure Code* (*Act XIV of* 1882), s. 251—*Court Fees Act* (*VII of* 1870), s. 22

[597] The petitioner was convicted under s. 186 of the Penal Code of obstructing a Civil Court peon, who was attaching his property in execution of adecree; the warrant of attachment was addressed to the Nazir of the Court, who delegated its execution to the peon by an endorsement of the peon's name.

Held, that the Nazir had authority thus to delegate the execution of the warrant to the peon.

The words "to be executed" in s. 251 of the Code of Civil Procedure would seem to imply that it was not intended that the "proper officer" should himself execute all warrants sent to him. And there is nothing in the Code which

* Criminal Revision No. 751 of 1894, against the order passed by Babu A. C. Chatterjee, Deputy Magistrate of Purneah, dated the 24th of September 1894.

(1) 11 A. 330. (2) 1 M. 226 (3) 19 C. 289.

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indicates in any way that warrants, being either warrants of arrest or of attachment, or for distress and sale, are to be executed by the "proper officer" in any manner different from the service of summonses.

The Court Fees Act (VII of 1870) distinctly contemplates that the peons are to be employed, not only for the service of summonses, notices or orders, but also for the execution of other processes, such as warrants of arrest or of attachment and distress.

Though the authority may well be conferred in more clear and explicit terms than are expressed by a mere endorsement by the Nazir of the peon's name, still it is impossible to say that that is not sufficient evidence of the delegation.

[F., 22 C. 759 (761); D., 40 C. 849 (852) = 17 C.W.N. 941 (913) = 19 Ind. Cas. 706 = 14 Cr. L. J. 274.]

THE petitioner, Dharam Chand Lal, was, on the 24th of September 1894, convicted by the Deputy Magistrate of Purneah under s. 186 of the Indian Penal Code of having obstructed one Miyajan, a Civil Court peon, who was attaching some property of the petitioner in execution of a decree, and was sentenced to pay a fine of Rs. 100. The warrant under which the attachment was made was issued by the District Judge of Purneah on the 5th of May 1894, and was addressed to the Nazir of his Court, Durga Proshad Dube. On the reverse appeared the following endorsement:

Jhumuk Lal (which was scored through) 4 *days*. 14-5-94. *Miyajan*. (*Sd.*) *K. Bhaduri*. 15-5-94.

The explanation given of this endorsement was that the warrant was made over for execution to Jhumuk Lal, in the first instance, on the 14th of May. He returned it on the morning of the 15th, with a verbal report that he could not execute it, as no one attended on behalf of the decree-holder to point out any property belonging to the judgment-debtor which he could attach. The warrant was on that day made over to Miyajan, whose name was endorsed on the warrant. On the 18th of May, the Nazir made a report to the [598] Sessions Judge, stating that the peon had been obstructed by the petitioner in the execution of the warrant. The Sessions Judge, on the 10th of August, examined the peon without notice to the petitioner, and gave the sanction for prosecuting the petitioner. Against this conviction by the Deputy Magistrate the petitioner appealed to the Sessions Judge, and, pending the hearing of the appeal, he applied to this Court and obtained a rule to show cause why the proceedings should not be quashed as bad in law, or, in the alternative, why the appeal should not be transferred to be heard by some other Judge.

Mr. *C. P. Hill*, Sir *Griffith Evans* and Mr. *C. Gregory* appeared in support of the rule on behalf of the petitioner.

The Advocate-General (Sir *Charles Paul*) and the Deputy Legal Remembrancer (Mr. *Kilby*) appeared to show cause on behalf of the Crown.

Mr. *Hill*, on behalf of the petitioner.—Miyajan, the Court peon, at the time of the occurrence, was not acting in the discharge of his public functions, and therefore the petitioner cannot be convicted under s. 186 of the Indian Penal Code. The warrant was addressed to the Nazir of the Court, and he did not execute it himself. He had no authority to delegate its execution to the peon. Nor is there anything to show that he did endorse it and so delegate its execution. [NORRIS, J.—But s. 251 of the Civil Procedure Code says that the warrant is to be "delivered to the proper officer to be executed." It does not say that the proper officer should execute it himself.] The form of the warrant

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shows that: See Civil Process No. 28 in Appendix A to the General Rules and Circular Orders of the High Court. The form there corresponds with form No. 136 of the fourth schedule to the Code of Civil Procedure. I rely upon the case of *Symonds* v. *Kurtz* (1). That was a case decided under ss. 7 and 9 of 12 and 13 Vict., cap. 50. See also Criminal Revision cases No. 240 of 1894 upon a reference from the Sessions Judge of Tirhoot (2). No. 610 of 1894 (3), and No. 414 of 1894 (4). The case of *Abdul Karim* v. *Bullen* (5) seems to be against **[599]** me, but that case is a marvellous instance of gross misapplication of authorities. I also contend that the accused was exercising his right of private defence: See *Queen-Empress* v. *Tulsiram* (6). The next point is with regard to the validity of the sanction. In a case of this kind notice ought to be given to show cause. The matter was not a proceeding before a Court, and that distinguishes it from the Full Bench case of *Krishnanunda Das* v. *Hari Bera* (7). Here the proceedings came before the Court on the report of the Nazir. In *Queen-Empress* v. *Sheik Beari* (8), decided by a Full Bench of the Madras High Court after the above case, it has been held that there must be a judicial enquiry, and the party to whose prejudice sanction is given must be previously heard. There being no formal complaint, the Magistrate who took cognizance of the offence had no power to do so. The proceedings are void *ab initio*. [BEVERLEY, J.—It appears from the Civil List that the Magistrate has not been empowered to take cognizance of offences under s. 191, cl. (*c*) of the Code of Criminal Procedure; if that is so, s. 530, cl. (*k*), makes the proceedings absolutely void.]

The Advocate-General (Sir *Charles Paul*), on behalf of the Crown.—There is an appeal pending to the Sessions Judge, and this Court cannot interfere at this stage. The petitioner has not exhausted his remedy in the lower Court. All ministerial acts can be performed by delegation: See *Walsh* v. *Southworth* (9). See also Reg. XIII of 1793 and Reg. XXVI of 1814, and Bengal Act V of 1863. All these have been repealed, but they go to show that the Nazir has always been allowed to delegate his authority to his subordinates. See also s. 22 of the Court Fees Act (VII of 1870) and Part I, Chap I, Rule 9 (*m*), and Part II, Chap. VII, Rule 11 in the General Rules and Circular Orders of the High Court; these clearly contemplate that the peons are to be employed for the execution of such processes as warrants of arrest or of attachment and distress.

[600] The following judgments were delivered by the Court (NORRIS and BEVERLEY, JJ.):—

JUDGMENTS.

BEVERLEY, J.—The petitioner, Dharam Chand Lal, has been convicted under s. 186 of the Penal Code of obstructing one Miyajan, a Civil Court peon who was attaching his property in execution of a decree, and he has been fined Rs. 100. Against this conviction the petitioner has appealed to the Sessions Judge, and he has also obtained a rule from this Court to show cause why the proceedings should not be quashed as bad in law, or, why the appeal should not be transferred to be heard by some other Judge. The principal point urged before us is that, at the time of the occurrence, Miyajan was not acting in the discharge of his public

(1) 16 Cox's C.C. 726.
(2) (3) and (4) Unreported.
(5) 6 A. 385.
(6) 13 B. 168.
(7) 12 C. 58.
(8) 10 M. 232.
(9) 6 Exch. 150.

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functions, inasmuch as the warrant of attachment was addressed to the Nazir of the Court, and the Nazir had no authority to delegate its execution to the peon; nor, in fact, did he so delegate its execution.

A further point was raised that the Deputy Magistrate ought not to have taken cognizance of the case, inasmuch as there was no formal complaint or sanction of the Court which issued the warrant; but on this point we need say no more than this, that although there may have been some slight irregularity in the institution of the proceedings, it does not appear to us that that irregularity has occasioned any failure of justice, and we should not, therefore, be disposed to interfere with the conviction on that ground.

The warrant in question in this case is in the printed form No. 28 authorized by this Court, corresponding with the form No. 136 of the fourth schedule to the Code of Civil Procedure with such modifications as have been sanctioned by this Court under s. 644.

The warrant was issued by the District Judge of Purneah on the 5th May 1894, and was addressed, as usual, to the Nazir of his Court, Durga Proshad Dube by name. On the reverse is the following endorsement: "*481, Jhumuk Lal* (scored through) *4 days. 14-5-94. Miyajan* (*Sd.*) *K. Bhaduri. 15-5-94.*"

The endorsement is thus explained in the evidence of the Nazir Durga Proshad Dube, and of the Naib Nazir Kali Nath **[601]** Bhaduri. The warrant was made over for execution to Jhumuk Lal, in the first instance, on the 14th May. He returned it on the morning of the 15th, with a report that he could not execute it, as no one attended on the part of the decree-holder to point out any property belonging to the judgment-debtor which he could attach. The decree-holder's mukhtar complained that Jhumuk Lal had never told him that he was going to execute the warrant, and at his request the warrant was that same day made over to another peon, Miyajan, whose name was then and there endorsed on the warrant.

In arguing the matter before us, Mr. Hill has relied upon the case of *Symonds* v. *Kurtz* (1) and upon two unreported decisions of this Court.

In Revision case No. 240 of 1894, upon a reference from the Sessions Judge of Tirhoot, a Bench of this Court (Trevelyan and Banerjee, JJ.) set aside a conviction under s. 186 of the Penal Code, on the ground that the person obstructed was not acting in the discharge of his public duties in executing a certain warrant. The warrant in that case was issued by the Magistrate for the realization of a chokidar's salary under s. 45 of Bengal Act VI of 1870; it was addressed to the Court Sub-Inspector, and was by him endorsed to a peon of the Sub-divisional Court, who was the person obstructed. The Court, having regard to the words of the section in question ("*and shall therein charge some person therein named* with the execution thereof") appears to have held that the Court Sub-Inspector had no authority to delegate the execution of the warrant to any other person.

In Revision case No. 610 of 1894, another Bench of this Court (Banerjee and Sale, JJ.) set aside a similar conviction under s. 186 of the Penal Code, on the ground that it was not proved that the person who was obstructed in the execution of the warrant had any authority to execute it. The warrant in that case was addressed to the Nazir of the Collector's Office at Serampore, but the person who went to execute it was the *Bakshi* or Assistant Nazir. The Court remarked: " There is nothing

(1) 16 Cox's C. C. 726.

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to show how the delegation was effected in this case, whether [602] there was any delegation at all by the Nazir, or whether the *Bakshi* merely followed what the Deputy Magistrate calls the usual practice, and took these two *purwanahs* addressed to the Nazir for the purpose of executing them without anything express being said to him by the Nazir. Upon this point there is an utter blank in the evidence. That being so, and the person against whom the warrants were issued being, as was observed by one of the learned Judges who decided the case of *Symonds* v. *Kurtz* (1), entitled to know whether it was executed by a person who had authority to execute it, we are of opinion that the conviction under s. 186 of the Indian Penal Code for obstructing a public servant in the discharge of his public functions cannot be sustained on the evidence as it stands." The further contention was raised in that case that the Nazir had no power to delegate his authority, but the Court expressly refrained from pronouncing any opinion upon that contention, there being no evidence before them that the Nazir had delegated his authority.

The case of *Symonds* v. *Kurtz* (1) arose out of the execution of a warrant of distress for sewers' rates under s. 7 of 12 and 13 Vict., cap. 50. Section 9 of that statute provides that the warrant issued by the Commissioners " may be directed to the Bailiff, Expenditor, Dyke-reeve, Collector, or other sewers officer within such limits, *and to any other person* or persons, or to any one or more of them, *as by the two Commissioners of Sewers granting the same shall be deemed fit.* " The warrant in that case was directed to the Collector of the sewers rates, who made it over for execution to another person, who again handed it over to a third person. It was held that, under the statute, the Collector had no authority to hand it over to any other person for execution. Field, J., said : " It is a general principle of law that every person whose house is entered and whose property is seized, is entitled to know the authority under which it is done, and to be able to see whether that authority has been followed. Here the warrant under the statute was given to him who had no authority to hand it over to another person for execution. It [603] would be a shocking thing to say that an authorized man can give the warrant to any person he pleases, and allow that person to commit a trespass. The respondent against whom the warrant was issued was entitled to know whether it was executed by a person who had authority to execute it, and the only person who would have such authority would be the person to whom it was directed. " And Cave, J., said : " I am clearly of the same opinion. The man who executed the warrant was not authorized to execute it."

It seems to me that none of the cases relied on by Mr. Hill concludes the matter now before us. In two of those cases the decision turned upon the wording of the special statute under which the warrant in question was issued, and in the third case this Court expressly refrained from deciding the point, not being satisfied that the Nazir had, as a matter of fact, delegated his authority.

On the other hand, the question appears to have been before the Allahabad High Court in the case of *Abdul Karim* v. *Bullen* (2), and that Court decided that a Nazir was not debarred by anything in the Code of Civil Procedure from authorizing a deputy to execute a warrant for him, and that the endorsement of the deputy's name on the back of the warrant was sufficient *prima facie* evidence of the delegation. The learned

(1) 16 Cox. 726. (2) 6 A. 385.

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Advocate-General has also drawn our attention to the case of *Walsh* v. *Southworth*,(1), in which it was held that a warrant directed by two Justices to the Overseers of a township could legally be executed by them by deputy. In that case Pollock, C. B., said: "It is quite clear that for mere ministerial purposes every public officer may appoint a deputy as for the performance of acts which do not require any exercise of discretion or judgment." Parke, B., said: "A public officer, whose duty is purely ministerial, may always appoint a deputy." And Martin, B., said: "I think that the execution of a warrant is purely such a ministerial duty as to justify the Overseers in deputing it to other parties."

It seems to me, however, that this is not a matter to be decided in accordance with English law and precedents, but that **[604]** we should rather look to the practice and procedure which obtains and has obtained in Bengal in respect of the service and execution of processes. There is no analogy whatever between the legal status of a Sheriff in England and the office of the Nazir of one of our Mofussil Courts. The question before us is simply, whether, under the law and practice obtaining in the Mofussil, a Nazir has authority to execute processes addressed to him through his deputies or subordinates; and this is really the only question in the present case, because the evidence clearly shows that the peon, Miyajan, was deputed by the Nazir to execute the warrant of distress.

Now it may be convenient, in the first instance, to examine the provisions of the Code of Civil Procedure as regards the service and execution of processes of Court.

Section 72 deals with the summons to a defendant, and it prescribes, that the summons shall ordinarily be delivered or sent to the proper officer, *to be served by him or one of his subordinates.*

Section 94 prescribes that all notices and orders required by this Code to be given to or served on any person shall be . . . served in the manner hereinbefore provided for the service of summons.

Section 166 provides that every summons to a person to give evidence or produce a document shall be served as nearly as may be in manner hereinbefore provided for the service of summons on the defendant.

Section 251 relates to the issue of a warrant for the execution of a decree and runs as follows: "Such warrant shall be dated the day on which it is issued, signed by the Judge or such officer as the Court appoints in this behalf, sealed with the seal of the Court, and *delivered to the proper officer to be executed.* And a day shall be specified in such warrant on or before which it must be executed, and the proper officer shall endorse thereon the day and manner in which it was executed, or, if it was not executed, the reason why it was not executed, and shall return it with such endorsement to the Court from which it issued."

The words "to be executed" in this section would seem to imply that it was not intended that the "proper officer" should **[605]** himself execute all warrants sent to him. And indeed there is nothing in the Code which indicates in any way that warrants, being either warrants of arrest or warrants of attachment or for distress and sale, are to be executed by the "proper officer" in any manner different from the service of summonses. In the case of attachment of moveable property, for instance, the warrant is directed to the Nazir, and s. 269 of the Code provides that "the attaching officer shall keep the property in his own custody,

(1) 6 Exch. 150.

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or *in the custody of one of his subordinates*, and shall be responsible for the due custody thereof."

Section 336 treats of the arrest of a judgment-debtor and speaks of the officer authorized to make the arrest; and s. 337 speaks of "*the officer entrusted with the execution of the warrant.*"

Now the "proper officer" to whom all summonses and warrants are sent in the ordinary course of business in accordance with the provisions of ss. 72 and 251 of the Code is the Nazir, and in the case of warrants they are expressly directed to him for execution. That is clear from the printed forms prescribed by the High Court.

The Nazir has been recognized as the proper officer of the Court for the purpose of executing its processes from the earliest times of the British administration of justice in Bengal. In Reg. IV of 1793, which was the first enactment on the subject of procedure in civil cases, it was laid down in s. 5 that the summons on the defendants was to be served "by the Nazir or his inferior officer;" and s. 6 provided that when material witnesses did not appear upon summons, the Court might issue an order to the Nazir to seize and bring the witnesses before the Court; s. 13 prescribed that "every process, rule, order or decree of the Zillah and City Courts . . . was to be immediately served or executed without application to any person or the interference of any individual whomsoever, according to the requisition of it within the limits of the special jurisdiction of each Court."

Section 21 provided for the service of summonses and the execution of processes by peons, and fixed their scale of remuneration. The name of each peon deputed to serve the process, [606] the amount of his subsistence money, and the number of days for which he was to receive it, were to be endorsed on the writs.

Regulation V of 1804 provided for the appointment and removal of native officers of Government in the Judicial and other departments; but the Regulation was not to affect the "Naib Nazirs, mirdahs, peons and *burkundazes*, and similar descriptions of public servants who are nominated and removed upon sufficient cause by their immediate superiors under the responsibility of the latter for their good conduct;" and s. 12 allowed the Nazirs "as heretofore to appoint their own naibs and the mirdahs and peons or any similar descriptions of public servants employed under their immediate direction and control."

By Reg. II of 1806, s. 2, cl. (3) the summons was to be served on the defendant "through the Nazir of the Court by a single *chaprassi* or *peon;*" Regulation XXVI of 1814 again dealt with the same subject of procedure in civil cases; and s. 13 treated of the *peons* employed under the Nazir for the execution of processes. Those peons who were not salaried servants of Government were to be registered and to wear a distinguishing badge, and the section provided for their remuneration out of the *tallubbanah*. By Reg. VII of 1825, s. 3, the Judges and Registrars of the Zillah and City Courts, who usually employ the Nazirs of those Courts to conduct the public sale of personal property in execution of decrees, or other judicial process, were authorized to employ the same officers in the public sale of immoveable property.

By Reg. VII of 1832, s. 5, Munsifs were authorized to levy *tallubbanah* for the service of processes, but by cl. 4 of that section the duties assigned to the Nazir in Reg. XXVI of 1814 were to be performed by the Munsifs themselves. This rule was abrogated by Act XIV of

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1845, which enacted that Munsifs also should retain Nazirs on their establishments.

In the third edition of his *Procedure of the Civil Courts of the East India Company in the Presidency of Fort William in Regular Suits"* (*1856*) Mr. William Macpherson says at p. 181: ' The process is executed by the Nazir of the Court through his inferior officers, the peons attached to the Court." And at [607] pp. 190, 196 and 423 forms are given of writs, addressed in every instance to the Nazir of the Court.

The old Regulations to which I have referred were repealed some years ago, but it has been thought necessary to refer to them, in order to show that the present system under which all processes of the Civil Courts are executed through the Nazir's establishment is a system that has been in existence for over a century. Certain changes in details have been effected of late years, but they do not affect the general principle that the Nazir has always been regarded as the "proper officer" responsible to the Court for the execution of its processes, and that he is allowed to entertain a subordinate establishment to whom the duty of personally serving or executing the processes sent to him may be delegated. The Nazir is now one of the ministerial officers of the Court referred to in Chap. VI of Act XII of 1887; he is a salaried officer of Government, giving security to Government for the due performance of his duties. The Naib Nazir and the peons are also now salaried officers of Government, subordinate to the Nazir. The number of the peons to be employed for the service and execution of processes in each district is by s. 22 of the Court Fees Act fixed by the District Judge, and the remuneration is by s. 20 settled by the High Court. The Court Fees Act distinctly contemplates that the peons are to be employed, not only for the service of summonses, notices or orders, but for the execution of other processes, such as warrants of arrest or of attachment and distress. By the rules of this Court, Nazirs are held "responsible for the due and regular service of all processes entrusted to them for service by themselves *and their subordinates*, and in each case for the correctness of the statements made in the return."—Civil Rules and Orders Part I, Chap. I, s. 9 (*m*). The rates of salaries fixed by the Court are given in Part II, Chap. VII, s. 10.

The practice of endorsing the name of the peon upon the back of the process, as evidence of his being delegated or deputed to execute it, dates, as has been said, from 1793, and although, as was pointed out by the learned Judges who decided the case of *Abdul Karim* v. *Bullen* (1) above referred to the authority might [608] well be conferred in more clear and explicit terms than are implied by the mere endorsement of the peon's name, still it is impossible to say that that is not sufficient evidence of the delegation. Nor would it seem that the person against whom such a warrant is issued has any real ground for questioning the peon's authority to execute it, or that he has any right to complain that he is left in ignorance as to that authority. The warrant itself bears the seal and signature of the Court from which it issues; the peon who executes it wears a badge on which is engraved the name of the Court to the establishment of which he belongs; he is a salaried Government servant, and his name is endorsed on the back of the warrant. It would seem, therefore, that there are sufficient safe-guards against a person being subjected to illegal process, and sufficient material to enable any person so subjected to obtain redress.

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(1) 6 A. 385.

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I am of opinion, therefore, that Mr. Hill's contention in this case fails. I find that the Nazir had authority to delegate the execution of the warrant to Miyajan peon, and that it is proved that he did so delegate it.

At the same time I think that, having regard to the fact that the person alleged to have been obstructed was a peon on the establishment of the District and Sessions Judge of Purneah, and that the conduct of the Nazir of the Judge's Court is called in question, it will be more satisfactory to all parties if the appeal is heard by some other Judge. As we intimated at the hearing, therefore, the appeal is transferred for trial to the Sessions Judge of 24-Pergunnahs, and we direct that the records, be sent direct to his Court with a copy of this order, in order that there may be no further delay in the hearing of of the appeal.

NORRIS, J.—I am of the same opinion and for the same reasons.

S.C.B.

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[609] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Shand and Davey and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

LACHMAN LAL CHOWDHRI (*Defendant*) v. KANHAYA LAL MOWAR (*Plaintiff*).

[16th November and 15th December, 1894.]

Limitation Act (XV of 1877), *sch. II, arts.* 118 *and* 141—*Adoption—Practice among the Gayawals of Gaya of adopting sons—Findings of fact on documentary evidence apart from construction.*

Against a claim for the proprietary right by inheritance brought by the nearest *bandhu*, or cognate heir, of the deceased, the defendant, in possession, set up his adoption by the widow under her husband's authority. The Courts below had found that no such authority had been given, and that the widow, not adopting to her husband, had adopted the defendant as her son: *Held*, that on the facts found, this was not a suit to which limitation under art. 118, sch. II, Act XV of 1877, was applicable.

The Courts below had also concurred in finding against the fact of a *dattaka* adoption having taken place, which would have had the effect of removing one of the plaintiff's ancestors into another family, whereby a necessary link in the succession would have been lost to the plaintiff's title had this adoption been proved.

As a ground for interference with these findings of facts, it was suggested that the evidence consisted, in a great measure, of documents, of which the construction had been matter for decision, thus redering the questions to be other than of fact. But it was held that they turned on the effect of the evidence afforded by the documents, and not on the construction, so that there was no reason for departing from the ordinary rule as to the concurrence of two Courts upon fact.

The proved practice of the Gayawals in adopting sons did not sever the adopted child from the family of his natural father, so that he did not lose his rights therein.

[**Diss.**, 104 P.W.R. 1914=203 P.L R. 1914; **R.**, 26 A. 40 (65)=23 A.W.N. 163; 29 A, 267=4 A.L.J. 121=A.W.N. (1907) 36; 34 A. 8 (12)=8 A.L.J. 1101=11 Ind. Cas. 476; 21 B. 159; 24 B. 260 (**F.B.**); 20 M. 40 (45)=6 M.L.J. 272; 26 M. 291 (295); 1 Bom.L.R. 799; 13 C.L.J. 418=15 C.W.N. 752 (755)=10 Ind. Cas. 325; 11 C.P.L R. 49 (51); 9 Ind. Cas. 163=9 M.L.T. 303=(1911) 1 M.W. N. 192; 2 N·L.R. 98 (100); 10 O.C. 308 (B); 1 P.R. 1907=31 P.W.R. 1907; 56 P.R. 1903 (**F.B.**)=93 P.L.R. 1903; 37 B. 513=15 Bom.L.R. 533=20 Ind. Cas 162; **Cons.**, 26 M. 291 (306)=13 M.L.J. 27; **D.**, 24 A. 195=22 A.W. N. 10.]

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APPEAL from a decree (12th September 1890) of the High Court at Calcutta, affirming a decree (1st February 1889) of the Subordinate Judge of Gaya.

The respondent's father, Srikishen Lal, now represented by his son, the respondent Kanhaya Lal Mowar, sued, on the 9th January 1888, to recover from the defendant, now appellant, possession of land and property in Gaya, which had belonged to Kishen Lal Chowdhri, who died on the 16th February [610] 1846. This estate had then remained in the possession of his childless widow, Bhuina Chowdhrain, down to her death on the 30th October 1886. The common ancestor of both the plaintiff and of Kishen Lal was Amir Chand Chowdhri, paternal great-grandfather of Kishen Lal. The plaintiff was the son of the daughter of Kishen Lal's paternal uncle, and he claimed to inherit, on the death of the widow Bhuina, as the nearest *bandhu*, or cognate, and therefore heir, of Kishen Lal. The defendant, who was nephew (brother's son) to the widow Bhuina, was in possession of the property, and defended the suit on the grounds, *first*, that he had been adopted by her to her deceased husband, Kishen Lal, under an authority from the latter; *secondly*, that Mulchand, father of the plaintiff's mother, had passed by adoption into another family, so that through him the plaintiff could not make title.

The parties to this litigation, and those through whom they claimed, belonged to a tribe of Brahmins in Gaya known as Gayawals, who were divided into several *gotras*, or families, having various patronymics, such as the Mowars, to whom the plaintiff belonged, the Chowdhris, to whom the appellant alleged that he belonged, and the Nakphophas, into whose family this appellant contended that Mulchand, the grandfather of the plaintiff, through whom the latter sought to make title as a *bandhu*, had been adopted, arguing that the line of succession had thus been broken.

The Courts below having found that the defendant had failed to prove that Bhuina Chowdhrain had authority to adopt him to her husband, or that she had, in fact, so adopted him, but that she had adopted the defendant as her son, and having also found that she retained her husband's estate down to her death, the questions raised on this appeal were the following: Was the plaintiff barred by limitation under art. 118 of sch. II of Act XV of 1877, by reason of his not having sued to obtain a declaration that the defendant's alleged adoption was invalid or never took place within six years from the time when he first knew of the adoption? *Secondly*, was Mulchand so adopted by his uncle Tirbhawan Nakphopha into his family *gotra*, as to have ceased in law and fact to be of the Chowdhri family, and thereby had it [611] become impossible for title to be made through him as a *bandhu* of Kishen Chowdhri?

The first Court, on the issue of limitation, held that as the suit was brought within two years of Bhuina's death, and as she had possession of the estate in dispute in her own right, and not for a widow's estate, the plaintiff's suit was not barred. Also, that the adoption of Mulchand by Tirbhawan had been, at most, an arrangement such as those practised among the Gayawals, which had not altered the status of the adopted boy or changed him from being the child of one family to be one of another family.

The High Court taking into consideration the 118th article of sch. II of the Limitation Act (XV of 1877) and the decision in *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chowdhri* (1), that the art. 129,

(1) 13 C. 308=13 I. A. 84.

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sch. II of Act IX of 1871, corresponding to art. 118 of the later Act, applied to all suits which could not succeed unless without an apparent adoption having to be displaced, held that the present case did not fall thereunder, but rather resembled *Raj Bahadur Singh* v. *Achumbit Lal* (1), where the adoption had been made to the widow herself, and not to her husband. On the question of the adoption of Mulchand by Tirbhawan, the Judges were of opinion that it had not caused Mulchand to be severed from the *gotra* of his natural family, and they considered that his adoption by his maternal uncle Tirbhawan having been so related to him, would not, in any case, have been valid by Hindu law.

The plaintiff's claim was decreed on the finding that he was, as he claimed to be, the nearest *bandhu* to the deceased, and on the failure of both the above grounds of defence.

On this appeal,—

Mr. *R. V. Doyne*, for the aprellant, argued that the plaintiff's suit was time-barred under the 118th article, sch. II of Act XV of 1877. He referred to the evidence which seemed to shew that the plaintiff had knowledge of an adoption, carrying with it the succession to the property, having taken place, and that he had known of it more than six years before he sued. The construction placed on the 118th article, by reference to the law enacted in **[612]** 1871, as interpreted by *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chowdhri* (2) was that the limitation of six years applied to suits which could not succeed without displacing an apparent adoption. Here Bhuina might be understood to have purported to adopt to her husband, whether validly or not; and the question of validity could not now be raised. In the "Hebanama for adoption," executed by her on the 15th April 1849, and registered on the 19th June following, she described herself as "widow and heiress of Kishen Lal," and declared that, by reason of being childless, she had, according to the permission of her deceased husband, adopted, as her son, Lachman Lal, giving him that name, and that she had made a gift to him of the estate left by her husband.

After adverting to other evidence in support of the second ground of defence, *viz.*, the alleged adoption of Mulchand by his uncle, Tirbhawan Nakphopha, which was said to have had the effect of severing him from the *gotra* of his natural father, the learned counsel referred to the decision of the Provincial Court of Azimabad in a suit instituted by Mulchand in 1797 to establish his title as the adopted son of Tirbhawan and his wife Jhuna to the estate of his adoptive father. After proceedings in the District with varying results, the judgment of the Provincial Court, in 1800, was that the adoption had been established as "in accordance with a custom prevailing in a certain community for many centuries." It was submitted that this judgment alone proved conclusively against the plaintiff, who by his plaint claimed through Mulchand, the valid adoption of the latter by Tirbhawan Nakphopha; and on this, and further documentary evidence, it was argued that the finding of the High Court against the adoption of Mulchand was erroneous in law and fact, having proceeded upon a misconstruction of the documents adduced, which clearly established a complete severance of Mulchand after his adoption from his natural father's family. This would be a ground for considering the evidence.

Mr. *J. D. Mayne*, for the respondent, was not called upon.

(1) 6 I. A. 110.

(2) 13 C. 308 = 13 I. A. 84.

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JUDGMENT.

Afterwards, on the 15th December, their Lordships' judgment was delivered by

[613] LORD SHAND.—The plaintiff, the respondent in the present appeal, is, according to natural relationship, the nearest *bandhu* or heir of Kishen Lal Chowdhri, who died on the 16th February 1846 without issue, but survived by his widow Bhuina Chowdhrain, who possessed his estates till her death on the 30th October 1886, when the appellant took possession.

The present suit was instituted on the 9th January 1888. The respondent asked that his right of inheritance in respect of the properties left by Kishen Lal Chowdhri should be declared by decree, and that he should be awarded possession. The title set up by the defendant and appellant was that of a son, on the statement that Kishen Lal Chowdhri before his death had given permission to his wife to adopt a son to him, and that after his death she had exercised the power given to her and had adopted him as the son of her deceased husband.

This ground of defence has failed. There are concurrent findings of the Subordinate Judge of Gaya and of the High Court, that the appellant had failed to prove that Bhuina Chowdhrain had authority from her husband to adopt, or that she did validly adopt the appellant as a son to her husband. Accordingly the argument for the appellant under this appeal was not rested on any title which he himself had, but entirely on the possession he had gained of the properties in dispute.

In this view his counsel maintained two grounds of defence: The first of these was that the respondent had no title to succeed, because, admitting his natural relationship to the deceased Kishen Lal Chowdhri, it was alleged by the appellant, and had been proved, that the respondent had been adopted into another family, with the result that he ceased in law and in fact to be a member of the Chowdhri family, and therefore could not take up the succession of Kishen Lal Chowdhri. The second was the defence of limitation. The judgments of both Courts were against the appellant on these grounds of defence also.

It will be convenient to deal with the plea of limitation in the first instance. The Subordinate Judge held that the limitation of twelve years which was pleaded had no application, because the suit had been raised within two years of Bhuina Chowdhrain's [614] death, and she alone in her own right and not as representing her alleged adopted son had after her husband's death possessed his properties till she died. The High Court held that the alleged adoption, even if made, was to the widow herself, and not to her husband, and that such adoption could not give any right to the property of the husband and could not, therefore, found any plea of limitation against the respondent's claim to that property.

The appellant's counsel, founding on s. 118 of the schedule to the Limitation Act, argued that the limitation of six years from the date of the alleged adoption of the appellant barred the suit. It was maintained that the suit was one in effect to obtain a declaration that the adoption of the appellant was invalid, or had never in fact been made, and that six years had elapsed after the alleged adoption had become known to the respondent before the suit was instituted. If the adoption was really made by Bhuina Chowdhrain of a son to herself and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation

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could have no application in this suit, which relates entirely to the husband's estate. But, in the opinion of their Lordships, there is another ground in respect of which also this defence clearly fails, *viz.*, that it has not been proved that the alleged adoption did become known to the respondent till the death of Bhuina Chowdhrain, which occurred within two years of the institution of the suit. It has been held by both Courts that the appellant, who is said to have been adopted about two years after the death of Kishen Lal Chowdhri, when he was about five years of age, had no possession until after Bhuina Chowdhrain's death. So far as possession was concerned the respondent had, therefore, no notice of alleged adoption so long as Bhuina Chowdhrain lived. Further, there is no direct evidence that the respondent was in any way made aware of the appellant's alleged adoption until after her death. The only evidence to a different effect to which the appellant's counsel could refer in order to show the requisite knowledge was a passage in the respondent's own deposition (Record, p. 143) in which, after a denial that the appellant had been adopted, he says : "Had Bhuina Chowdhrain adopted the defendant, I must have known it," on which it was said that his knowledge must be [615] inferred, as it was proved that he was frequently in Bhuina Chowdhrain's house after the alleged adoption took place, and that in this way he must have become aware of it. It is clear that such evidence is plainly insufficient to prove the requisite knowledge, and the plea of limitation therefore fails.

The other ground of appeal maintained, and which formed the subject of the third issue settled by the Subordinate Judge, was that the respondent's deceased grandfather, Mulchand, through whom the respondent now claims, and who with Kishen Lal was descended from Amir Chand as their common ancestor, had been adopted into the family of Tirbhawan Nakphopha, and thereby for himself and his descendants "went out of his father's family into the family of Tirbhawan Nakphopha who adopted him." (Appellant's written statement, para. 5, p. 8). This averment was denied in the written statement of the respondent who alleged (para. 2, p. 11) "that Mulchand Chowdhri was never adopted as a *daitaka* son by his maternal uncle Tirbhawan Nakphopha, nor could he have been adopted according to the *Shastras*, nor was he severed from his Chowdhri family."

The third issue relating to this defence was in these terms (Record, p. 175) : "Was Mulchand Chowdhri adopted in *dattaka* form by Tirbhawan Nakphopha, and was that adoption valid ? Whether by that adoption, even if invalid, he had lost his status in his father's family ?" The evidence showed that amongst the Gayawals, a sect of Brahmins residing in the district of Gaya, to which the parties to the present suit and their families belong, there exist peculiar and loose customs in regard to adoption ; and in particular that, although adoption of a son may be made so as to give him rights of succession to his adopting father, this will not necessarily sever his connection with his own natural father or his family. In the district of Gaya there exist many places of sanctity connected with the ancient Buddhism, and the Gayawal Brahmins have the privilege of acting as guides to the pilgrims who visit these places, and thereby make considerable sums ; and by adoption into different families, facilities are given for the acquisition of property, without severing the adopted son's connection with his own family. The witness Kishen Lal Kharkhoka (Record, p. 172) deponed that a Gayawal might become the *malik* [616] or successor, of four families, and be called the

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adopted son of all the families, adding to his own name the designation of all those families in which he became the *malik*; and various other witnesses give evidence to the same effect.

On this part of the case the Subordinate Judge says: "There is no direct evidence to prove that Mulchand was adopted, and much less in *dattaka* form, by his maternal uncle Tribhawan Nakphopha. In some documents, allusions to and inferences of Mulchand's adoption appear; but the question is how far those will establish an adoption in *dattaka* form. None of those documents show that Mulchand was adopted in that form." And after a reference to certain of the documents produced, he again observes in dealing with the evidence (Record, p. 177):—

"It further appears from the evidence of witnesses adduced by both parties that very loose practices prevail amongst the Gayawals regarding adoption. Even a person who gets another's property by gift assumes the surname of his donor, and calls himself as his adopted son. This loose practice had its origin in order to induce the pilgrims of his donor to acknowledge the donee. These form the bulk of their property and the greatest source of income of these Gayawals. In adoption, even, they adopt anybody quite contrary to Hindu law. They adopt daughter's and sister's sons, and only sons; and widows even adopt without their husband's authority previously given. From what time such practices arose does not appear from the evidence; but apparently from the decline of the Gayawal dynasty. These people are found in Gaya alone, and their marriages, &c., are confined to this place. The fabulous 1,484 families of Gayawals have now dwindled to 200 or 300. Hence every one, more for the pilgrims than for their properties, makes such gifts or adoption in favour of those whom he or she loves, and the donees call themselves adopted sons. This practice also does away with escheats.

"In face of such loose practices and change of surnames, I cannot, without any satisfactory evidence of adoption, hold that Mulchand was adopted by his maternal uncle, and much less in the *dattaka* form. The fact of Mulchand retaining his surname Chowdhri, and being described in Kishen Lal's lease (Ex. E) as his grand-uncle or grandfather's brother in 1836, leaves no room to doubt that even after Gopal Chand's adoption by Sahar Chand, he continued to be a member of Chowdhri family, and was the manager and guardian of Kishen Lal in respect of properties inherited by him from Sahar Chand. Mulchand's adoption by his maternal uncle is also invalid under Hindu law as it obtains in Bengal and is established by case law of the Calcutta High Court. Under such circumstances, I cannot hold that Mulchand was totally estranged from the family of Chowdhri or lost the status in his father's family. I find the third issue against defendant."

[617] On appeal the High Court came to the same conclusion. The learned Judges say (Record, p. 188):—

"The first point strongly pressed for the appellant is, that Mulchand was adopted in the *dattaka* form by his maternal uncle Tirbhawan Nakphopha; and of course, if this be established, the plaintiff's suit must fail, because he claims through Mulchand. Now there is, as the Subordinate Judge observes, no direct evidence that Mulchand was adopted in the *dattaka* form by Tirbhawan Nakphopha, and such an adoption, too, would not be valid under Hindu law, which prohibits a brother from adopting his sister's son. Several documents are relied upon as evidencing the adoption. One of these (Ex. B), being a copy of a copy, is, we think, clearly inadmissible and was rightly so treated by the Subordinate Judge;

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and even if admitted, it does not show that Mulchand was adopted by Tirbhawan Nakphopha in the *dattaka* form. Exhibit A (a judgment of the Principal Sudder Amin, dated the 24th August 1844) shows that the adoption of Mulchand was alleged by the defendant Kishen Lal in that suit, but the question was not determined. We observe also that in this document Mulchand is called Chowdhri and Nakphopha, as if he belonged to both families. In Ex. E, dated 4th July 1836, he is described as Mulchand Nakphopha and Mulchand Chowdhri, and in Ex. L, dated 18th October 1866, he is described as Nakphopha only, so that we cannot infer from these documents that he had completely lost his status in his natural family. The strongest point in favour of the appellant's contention is, that the family properties in suit all vested in Sahar Chand, Mulchand's elder brother. This appears from Ex. A, which we have just referred to; but we do not think that this fact is of itself conclusive proof that Mulchand was completely severed from his natural family. In several documents, extending from 1820 to 1841 (see Exs. LIV, LII, LVI, LVII, LVIII, LX and LI) he is called Mulchand Chowdhri and not Nakphopha, which, we think, indicates that he had not ceased to belong to his natural family. Again, in Ex. E, he is described as the grand-uncle of Kishen Lal Chowdhri, which he would be if he was still a member of his natural family, and if his son Gopal, Kishen Lal's father, had, as is alleged by the plaintiff, been adopted by Sahar Chand. We think, therefore, that the Subordinate Judge's view as to Mulchand's status in his natural family is correct, whatever may have been his status by some sort of *quasi* adoption in the family of Tirbhawan Nakphopha, according to the undefined customs and usages prevailing amongst the Gayawals.

There are thus concurrent findings against the appellant on this question, which is a question of fact, and the determination of which depends on the evidence. It was argued for the appellant that, as this evidence to an important extent consists of writings, the ordinary rule that this Board will not disturb the judgment of both Courts on facts does not apply. Their Lordships cannot accept **[618]** this view. The question is not one of construction of one or more deeds, which would be a question of law, but is a question as to the effect to be given to decrees, leases, and other documents as evidence of the fact of adoption, and its consequences. Their Lordships may add, however, that having heard the appellant's argument on the documents on which he specially founded, they see no reason for holding that there was any such adoption of Mulchand by his maternal uncle as took away from him his status or right of succession in his own natural family.

The decree of 1800 printed as a separate appendix does not appear to be specially mentioned in either of the judgments appealed against. It no doubt orders "that Mulchand as heir, *i.e.*, adopted son, be put in possession of the property left by Tribhawan and Mussummat Jhuna," but the judgment is based on the special and peculiar customs of the Gayawals which are twice referred to in the grounds of judgment stated. In its concluding part it bears:—

"Since Mulchand has been adopted in accordance with the customs prevailing among his caste people, therefore, the Judges of this Court think that there is left no room for the question that the adoption was not made according to the *Shastras*, because a custom which prevails in a certain community for many centuries and from the time of forefathers cannot be stopped, and it is proper that such custom should be acted upon. This is in accordance with and not opposed to the *Shastras*."

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Although the adoption was so made, it has not been shown, and it does not follow, that Mulchand ceased to be a member of his own natural family or lost his right of succession in that character.

The appellant's counsel further referred to the decrees in 1843 and 1844 by the Principal Sudder Amin of Behar, and by the District Judge of Behar on appeal, in a suit between Sunker Lal Nakphopha, alleging himself to be the "adopted son-and-heir of Mulchand Nakphopha Chowdhri," against Kishen Lal Chowdhri. The claim made was for one-half of certain properties to which Kishen Lal Chowdhri had succeeded on the death of his father Gopal Chand, the son of Mulchand who had been adopted into the family of Sahar Chand and who had succeeded to the properties on the death of his adoptive father. The ground of the claim was that Sahar Chand and Mulchand, who were brothers, had, on their father's death, jointly succeeded to the [619] properties in dispute, and that one-half of these belonged to Mulchand, and afterwards to his heir, being the plaintiff, as his adopted son. The defence was that no part of the properties ever belonged to Mulchand; they were acquired exclusively by Sahar Chand and were settled in title entirely in his name; and it was added that Mulchand had been adopted as the son of Tirbhawan Nakphopha and had no connection with the properties. The suit was dismissed on the ground that, from all the documents produced, it appeared that the properties in question had been acquired by Sahar Chand himself, and that in his name only the title to these properties stood, and the Court had no occasion to consider or decide any question as to Mulchand's alleged adoption into the family of Nakphopha, or the effect of such adoption if it took place as removing him from his own family of Chowdhri. The statements of the parties made in that litigation for the purposes of that suit cannot be taken as evidence in this case on the matter now in dispute, *viz.*, the alleged adoption of Mulchand into the Nakphopha family so as to take him out of his own natural family.

Their Lordships will humbly advise Her Majesty that the present appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondent: Messrs. *T. L. Wilson and Co.*

C. B.

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22 C. 619 (P.C.) = 22 I.A. 76 = 6 Sar. P.C.J. 572.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Shand and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

ABUL FATA MAHOMED ISHAK AND OTHERS (*Plaintiffs*) *v.* RASAMAYA DHUR CHOWDHRI AND OTHERS (*Defendants*).
[23rd November and 15th December, 1894.]

Mahomedan Law—Wakf—*Deed invalid as a* wakfnama—*Attempted family settlement in perpetuity—Ultimate, but illusory, gift for charitable purposes.*

An instrument, nominally a *wakfnama*, expressly purporting to make property *wakf*, settled it in perpetuity on the family of the dedicators, with an ultimate gift for the benefit of the poor, only to take effect upon the failure of the descendants of the family. *Held*, that a gift to the poor might be illusory

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from the smallness of the amount, or from its uncertainty or remoteness; and that the period when this gift was to take effect was so uncertain, and probably so remote, that the gift was illusory. Therefore, according to Mahomedan law, it did not establish a *wakf*.

[620] *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1) and *Abdul Gafur* v. *Nizamudin* (2) referred to and followed as to the principle that the charitable purpose, in order to establish a *wakf*, must be substantial, and not illusory.

Provision for the dedicator's family, out of the appropriated property, may be consistent with the making a valid *wakf*, where the appropriation is substantially for a pious or charitable purpose. But, as family settlement in perpetuity is contrary to the Mahomedan law, and as successions of inalienable life interests are forbidden, such depositions cannot be rendered legal by the mere addition of the words that they are made as *wakf*, or for the benefit of the poor, where no substantial benefit is conferred on the latter.

The decision of the Full Bench in *Bikani Mia* v. *Shuk Lal Poddar* (3) approved.

[F., 8 Bom. L. R. 245 (250) ; Appl., 84 P. R. 1906 ; R., 19 A. 211 (214) = 17 A. W. N. 49 ; 21 A. 329 (334) = 19 A. W. N. 106 ; 25 A. 236 (254) ; 33 A. 400 (411) = 8 A. L. J. 162 = 9 Ind. Cas. 753 ; 30 C. 666 (676) ; 35 C. 1 (13) = 4 A.L.J. 572 (P C.) = 9 Bom. L. R 872 = 6 C. L. J. 695 = 11 C. W. N. 973 = 17 M.L.J. 408 = 2 M.L.T. 479 = 4 L.B.R. 154 (163) ; 34 M. 12 (16) = 6 Ind. Cas. 1 = 20 M.L.J. 254 = 8 M.L.T. 16 ; 2 A.L.J. 519 ; 7 A.L.J. 1095 = 8 Ind. Cas. 578 (579) ; 5 Bom. L. R. 624 (628) ; 9 Bom. L. R 998 (1002) ; 14 Bom. L. R 295 (300) = 14 Ind. Cas. 988 ; 4 C.L J. 442 (455) ; 10 C.W.N. 449 (461) ; 2 N.L.R. 158 (160) ; 8 O.C. 379 (385) ; 11 O.C. 48 (53)]

APPEAL from a decree (24th February 1891) of the High Court (4) reversing a decree (18th April 1889) of the Subordinate Judge of Sylhet.

This suit related to a settlement of *taluks*, land and houses in Sylhet, valued at Rs. 52,094, which a deed of the 21st December 1868 purported to make *wakf*. This was executed by the first and second defendants, Abul Hossein Mahomed Abdur Rahman and Abu Mahomed Abdul Kadir, the two sons of Mahomed Idris Khan, a Sunni, who died in 1846. It declared that the brothers made a permanent *wakf* of all their immoveables, ancestral and purchased, then in their possession, for the benefit of themselves, of their children, of their children's children, and of their descendants, male and female ; and, ultimately, on the family becoming extinct by the failure of descendants, for the benefit of the poor and beggars and widows and orphans of Sylhet. The deed is set forth in the report of the appeal to the High Court in I.L.R., 18 Calc., 399 ; and the material parts of it, as well as the facts of the case, appear in their Lordship's judgment.

The question now was whether the above gift, which purported to be made for the benefit of the poor, was substantial or illusory.

The plaintiffs, now appellants, were the sons of the first defendant. [621] They sued, as beneficiaries under the deed of 1868, to have it declared valid as a *wakfnama*, creating an inalienable trust ; for a number of sales and mortgages of the property subject to the deed, alleged to have been effected by the first defendant without due authority, to be declared to have been illegally made, and to be void ; and for the first defendant to be deprived of the office of *mutwali* of the trust.

With the two first defendants were joined in the suit a hundred and nineteen others, either belonging to the family, or alleged to be interested in the property, which had been dispersed among some of them. Six of these appeared at the hearing of this appeal. The first two did not appear.

(1) 17 C. 498 = 17 I. A. 28. (2) 17 B. 1 = 19 I.A. 170.
(3) 20 C. 116.
(4) *Rasamaya Dhur Chowdhuri* v. *Abul Fata Mahomed Ishak*, 18 C. 399.

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The Subordinate Judge of Sylhet fixed an issue as to the validity of the appropriation, and decided that the property had been made *wakf* in 1868, having, in consequence, remained *wakf* ever since. He found that the brothers had, in execution of powers given by the *wakfnama*, exchanged some of the properties for others; and that, in after years, the first, having been involved in liabilities, had induced the second defendant to come to a partition with him. Afterwards the estate had been charged, encumbered, and alienated, in great part. He found, however, that part of the income had been spent in charity. In his opinion the *wakfnama* was not fraudulent, nor in any way contrary to the Mahomedan law. Once having become effective, it could not be cancelled, and it was not annulled by any of the subsequent acts and conduct of the two brothers, by whom the *wakf* having, in his opinion, been validly constituted, could not be revoked. He, in effect, decreed the claim. From this decree six of the defendants, who were those who now appeared as respondents on this appeal, filed their appeal to the High Court.

A Division Bench (Tottenham and Trevelyan, JJ.) reversed the above decision, holding that no valid *wakf* had been made. They premised by stating that, if the *wakfnama* of 1868 had created a valid *wakf* when it was executed, no subsequent conduct of the donors could affect its validity, unless the inference from that conduct was that they never intended to make a *wakf* at all. The Judges held, after reviewing all the authorities cited to them, that, to constitute a valid *wakf*, it must be in favour of a religious [622] or charitable purpose, although there might be a temporary, intermediate, application of the whole or of a part of the benefits to the appropriator's family. And they found that all the cases, sanctioning the latter arrangement, were those in which, at least, the ostensible and principal object of the *wakf* was a religious or charitable purpose. They also held that the ultimate appropriation must not depend on such an uncertain contingency as the extinction of a family, referring to *Pathukutti* v. *Avathalakutti* (1). They also referred to *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*(2) as to the requirement that the appropriation to a charitable purpose must be substantial and not illusory. Here, the deed of 1868 only used a form of words making the property inalienable, while the appropriators never really intended to give up their proprietary rights, abandoning before long the semblance of a trust. The judgment at length is given in I.L.R., 18 Calc., 399 and the cases cited are to be found there.

On this appeal by the plaintiffs,—

Mr. *J. H. A. Branson*, for the appellants, argued that the High Court had been in error in holding that the property subject to the deed of the 21st December 1868 had not been made *wakf*. An appropriation of property, ultimately to charitable purposes, with a direction that those who were to receive the beneficial interest should, in the first instance, be the appropriators, and, intermediately, their families and their descendants, with the provision that, on failure of the latter, the ultimate object should be to benefit the poor, was a valid *wakf*. *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (2) had not been decided adversely to his contention. This was that a settlement made by a dedicator on his family, and their descendants, for as long as any should exist, coupled with an ultimate gift for the benefit of the poor, deferred till the extinction of the family, might be validly made as a *wakf*. The judgment on the appeal referred to did not

(1) 13 M. 66. (2) 17 C. 498=17 I.A. 28.

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require a decision whether a gift to charitable uses, which was, only to take effect after the failure of all the grantor's descendants, was, or was not, an illusory gift—a point on which there had **[623]** been conflicting decisions in India. The judgment, indeed, added that the Committee had not been referred to any authority showing that, according to the Mahomedan law, a gift was good as a *wakf*, without there having been a substantial dedication of the property to charitable or pious uses at some period of time or other. But this left open the question what was a substantial gift as distinguished from an illusory one. Neither in that case, nor in the later one from Bombay, decided by their Lordships to the same effect, *Abdul Gafur* v. *Nizamudin* (1), was there an ultimate gift for the benefit of the poor. It was clear that a gift in their favour need not, in order to be substantial, be of immediate effect; and that it might be postponed to family interests in the property, *Bikani Mia* v. *Shuk Lal Poddar* (2). There was a concurrence in the decisions, that there might be a charge for the dedicator's family before an ultimate gift for a charitable purpose; and that a settlement upon the family was highly considered in the Mahomedan law was shown by the authorities collected in the judgment of Ameer Ali, J., in *Bikani Mia* v. *Shuk Lal Poddar* (2), where he referred to the subject of "*wakf* in favour of descendants." The latter appropriations were ranked with gifts to the poor, and a charitable purpose included benefactions for the support of the benefactor's own family. Though the judgment to which he referred, given at the hearing of the case by a Full Bench, differed from that of the majority, it formed a complete and most valuable review of the best authorities in the Mahomedan law, whether that law on the subject, in all its original strictness, had been followed down to the present day or not. The result of a survey of the early authorities was that a *wakf* of which the benefit was bestowed by the founder on his own family and descendants was in accordance with law.

After reference to the judgment of Ameer Ali, J., in *Mahomed Israil Khan* v. *Sashti Churn Ghose* (3), where the Court held that a *wakf* in favour of the settler's children and kindred in **[624]** perpetuity, with a reservation of a part of the income to the settler during his life, was valid, the opposite conclusions from decisions in which a different view had been taken were stated. These conclusions were that where a *wakf-nama* had, for its real object, nothing connected with religious observances, or charitable purposes, and where it provided nothing for the latter purposes, except upon an uncertain or too remote contingency, it created no *wakf*; also that a very remote or improbable contingency, merely specified to bring into operation a gift for the benefit of the poor which would not otherwise take effect, would not validate a settlement for the benefit of the dedicator's family and children, and their descendants, to last until their extinction. These were deducible from *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* (4) and *Mahomed Hamidulla Khan* v. *Lotful Huq* (5) among other cases. But, on the other hand, in the Bombay High Court, two judgments had been given to which attention should be drawn. In *Amrutlal Kalidas* v. *Shaik Hussein* (6) the Court, although disapproving of perpetuities, and deducing the last-mentioned propositions from the decisions, had given effect to a *wakf* in favour of a family, acting according to the law as that Court

(1) 17 B. 1 = 19 I.A. 170. (2) 20 C. 116 (140). (3) 19 C. 412.
(4) 10 B.H.C. 7. (5) 6 C. 744. (6) 11 B. 492.

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found it to be. The opinion held by West, J., in another case was followed. That opinion was given in *Fatma Bibi* v. *The Advocate-General of Bombay* (1), where he held that, "if the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not made invalid by an intermediate settlement on the founder's children and their descendants." And the Court in *Amrutlal Kalidas* v. *Shaik Hussein* (2) held that although the benefits, which the descendants might successively take, might constitute a perpetuity in the sense of the English law, still, according to the Mahomedan law, that did not vitiate the settlement, provided that the ultimate charitable object was clearly designated. Upon the above two Bombay cases this argument specially relied.

Abdul Ganne Kasam v. *Hussen Miya Rahimtula* (3) was [625] opposed to the decision in *Doe d. Jaun Bibee* v. *Abdollah Barber* (4) decided by the Supreme Court in Calcutta, and *Pathukutti* v. *Avathalakutti* (5) was distinguishable. In the latter case an attempt had been made to create a conditional *wakf*. This was a sufficient ground for deciding against there having been a *wakf* created. The condition in that case was that the *wakf* should only take effect if none of the appropriator's children should attain majority. In regard to the authorities in the Mahomedan law collected on the point, it was submitted that the expression "charitable purpose" should not be understood, in applying that law, in the same restricted sense in which it was employed in the English decisions; for the former authorities showed that the purposes of a *wakf* might comprehend a settlement upon a dedicator's family. Reference was made to Baillie's Digest of the Mahomedan Law, Hanifa, Chap. IX, 2nd edition, pp. 549, 595. He was of opinion that the meaning of *wakf* had been unnecessarily restricted to appropriations of a pious or charitable nature, and considered the term to include settlements on the dedicator himself and on his children. He looked upon a *wakf* as valid, although its purpose might have failed; for, in that case, the income of the appropriated property would go to the poor, that being presumed to have been the design of the dedicator (p. 553, Introduction, p. xxxvi). These opinions were founded on what formed the basis of his work, the Fatawa Alamgiri; and the deductions from the arguments of Abu Yusuf. Reference was made to Hamilton's Hedaya, Vol. II, Book XV, p. 334. That a *wakf* might exist in favour of the poor, there being a reservation of the usufruct of the property to the donor's family, was the view of the Mahomedan law and the older authorities were to the effect that the dedication, so long as it was one that had permanency in its object, might be for the benefit of the descendants of the dedicator as beneficiaries; and this appeared on cases decided by the Sadr Dewani Adalat. Not until it had ceased to be the practice in the law Courts to take the opinion of the Mahomedan law officer was there so much insistence upon a provision for a charitable purpose in the *wakf* as there had been since. After that and of recent years the cases had not followed an unvaried course of decision. They [626] had not, however, established that a settlement upon a man's own family might not, when coupled with an ultimate gift for a charitable purpose, though to take effect at a future period, be a *wakf*. There was in this case the ultimate gift to the poor, important also in reference to the requirement of a permanent class of beneficiaries. This ultimate gift was

(1) 6 B. 42. (2) 11 B. 492. (3) 10 B.H.C. 7.
(4) Fulton 345. (5) 13 M. 66.

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not illusory, but of value, so far as it went, and was sufficient to support the *wakf*. No doubt, after the decision of this case below, the same Court had decided that an instrument, purporting to be a *wakf*, but not containing any substantial dedication to a religious or charitable purpose, did not create a valid *wakf* in *Bikani Mia* v. *Shuk Lal Poddar* (1). It was, however, submitted that the true view was that the gift to the poor, *in the wakfnama of* 1868, was no unsubstantial or illusory gift; and that to support this dedication, upon its whole tenor and purport, would accord with the principles of the Mahomedan law on the subject.

Besides the above the following were referred to: The Tagore Lectures for 1884, by Mr. Ameer Ali, *Kutb Ali Hosein* v. *Syf Ali* (2), *Jewan Doss Sahoo* v. *Shah Kubeer-ood deen Ahamed* (3), *Kuneez Fatima* v. *Saheba Jan* (4), *Futtoo Bibee* v. *Bhurrut Lall Bhukut* (5), *Hossein Ali* v. *Hazara Begum* (6), *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (7), *Phate Saheb Bibi* v. *Damoodar Premji* (8), *Dayalchand Mullick* v. *Keramut Ali* (9), *Wahid Ali* v. *Ashruff Hussain* (10), *Luchmiput Singh* v. *Amir Alum* (11), *Jugatmoni Chowdhrani* v. *Romjani Bibee* (12).

Mr. *R. V. Doyne*, for the six respondents, argued that, when the provisions of the deed of the 21st December 1868 were examined, it appeared that there was no real intention on the part of the founders to give a substantial benefit to the poor, or, indeed, any benefit. The scheme was one of perpetual settlement upon the descendants of the dedicators in the male and female lines. The **[627]** only provision in favour of the poor was that, on the failure of any such descendant, the estate should be held for the benefit of the poor, and beggars and widows and orphans of the district. By those words, and there were no others referring to the poor, no duty was imposed upon any present or future *mutwali* to do any act of a charitable kind, and the family might, and probably would, remain to inherit for generations to come. It did bear on the intention of the dedicators that, after the execution of the deed, the first and second defendants continued to apply their income and manage their estate exactly as they had done previously. The ultimate trust for the poor was of so remote a nature as to be of no benefit to the poor within any definite time. The only possible contention open to the appellant since the decision in *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (13) was in reference to whether this ultimate gift did or did not fall within the range of gifts styled illusory in that judgment. But the remoteness and uncertainty of the period at which there was any probability of the gift coming into operation placed it at once among the illusory. In other respects the judgment in the above case governed this entirely. The gift to charitable uses was here employed merely to give colour to an otherwise undisguised family settlement; and the latter, according to the decisions of which the above need only be cited, was invalid as a *wakf*. He referred to Macnaghten's Principles and Precedents of Mahomedan Law, Chap. IX " of Endowment."

Mr. *J. H. A. Branson* replied.

Afterwards, on the 15th December 1894, their Lordships' judgment was delivered by :—

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(1) 12 C. 116. (2) 2 Sel. Rep. S.D.A. 110=6 I.D. (O.S.) 464.
(3) 2 M.I A. 390. (4) 8 W.R. 313. (5) 10 W.R. 299.
(6) 12 W.R. 344. (7) 13 W.R 235. (8) 3 B. 84.
(9) 16 W.R. 116. (10) 8 C. 732. (11) 9 C. 176.
(12) 10 C. 533. (13) 17 C. 498=17 I. A. 28.

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JUDGMENT.

LORD HOBHOUSE.—The object of this suit is to establish as a valid *wakfnama* a settlement of property effected by deed dated the 21st December 1868. The settlors were two brothers, called Abdur Rahman and Abdul Kadir, Mahomedan gentlemen belonging to the Hanifa sect of the Sunnis. The plaintiffs, now appellants, are sons of Abdur Rahman to whom interests are given by the settlement. The defendants, a hundred and more in number, are the settlors themselves, and persons claiming interests in portions of the settled property by virtue of transactions [628] with Abdur Rahman subsequently to the date of the settlement. Some of these claimants are respondents to the present appeal.

The Subordinate Judge of Sylhet held that the settlement was valid as a *wakfnama*, and gave the plaintiffs a decree on that footing. On appeal the High Court took a different view, and dismissed the suit. The great mass of the record relates to subordinate disputes: what parcels of property fall within the settlement, and what inferences are to be drawn from the way in which the settlors dealt with the property after the settlement. But the only question argued here has been the nature of the settlement itself; for in the view taken by their Lordships all others are immaterial.

The settlement begins thus: "Committing ourselves to the mercy and kindness of the Great God, and relying upon the bounty of Providence for the perpetuation of the names of our forefathers and for the preservation of our properties, we .... have made this permanent *wakf* according to our Mahomedan law." Then they describe the property conveyed by them. The objects are :—

"For the benefit of our children, the children of our children, and the members and relatives of our family and their descendants in male and female lines, and, in their absence, for the benefit of the poor and beggars and widows and orphans of Sylhet, on valid conditions and true declarations hereinafter set forth below. We, two brothers, have for our lifetime taken upon ourselves the management and supervision of the same in the capacity of *mutwalis*, and taken out the *wakf* properties from our ownership and enjoyment in a private capacity, and we have put them in our possession and under our control in our capacity as *mutwalis*."

Then are stated various incidents and duties attaching to the office of *mutwali*, amongst which occur the following :—

"In order to maintain the name and prestige of our family, we, the *mutwalis*, will make reasonable and suitable expenses according to our means and position in life. We will at our own choice and discretion fix allowances for the support and maintenance of the persons intended to be benefited by this *wakf*, who are now living or who may be born afterwards, and we will pay the same to them every month, and also the expenses for their festive and mourning ceremonies when required.

"It will be competent for us, the *mutwalis* and our successor *mutwalis*, to enhance or reduce the allowances of the persons for whose benefit the *wakf* [629] is made, who are now living, or who may hereafter be born, in consideration, of course, of their position and circumstances and the state of the income of the *wakf* properties. It will be competent for us, the present *mutwalis* and the *mutwalis* who will be appointed after us, to use the *wakf* properties as security and to grant *putni*, *dur-putni* and permanent and temporary *ijara* settlements in respect of them, and with the money to be received as *salami* for the aforesaid settlements, to purchase some

other properties and to exchange any of the lands of this *wakf* with some other lands, and to include the lands so acquired by purchase or in exchange in the *wakf*, and to spend the profit of the same towards the expenses of the *wakf*, and to keep the surplus profit in stock in the *Tehbil*, and to try always to increase the *wakf* properties and the amount in cash. Whatever properties may be acquired by us, the *mutwalis* and our successor *mutwalis*, after execution of this document, shall be included in this *wakf*. We, the *mutwalis* and the *mutwalis* who will be appointed in our place hereafter, shall have no power to make gift of any property in favour of relatives or strangers."

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It is provided that future *mutwalis* shall always be chosen from the male issue of the settlors, or, if they fail, from their relatives. Provisions are made to prevent any of the persons for whose benefit the *wakf* is made from claiming anything as of right, and from calling for accounts, and from alienating his interest or subjecting it to attachment. And towards the end of the deed its object is again stated :—

"The object of this *wakf* of properties is that the properties may be protected against all risks, the name and the prestige of the family maintained, and the profits of these properties appropriated towards the maintenance of the name and prestige of the family, the support of the persons for whose benefit the *wakf* is made, and religious purposes, &c."

Such is the instrument which is propounded as a *wakfnama*. The motives stated are, regard for the family name, and preservation of the property in the family. Every specific trust is for some member of the family. The family is to be aggrandised by accumulations of surpluses, and apparently by absorption into the settlement of after-acquired properties; and no person is to have any right of calling the managers to account. These possessions are to be secured for ever for the enjoyment of the family, so far as the settlors could accomplish such result, by provisions that nobody's share shall to be alienated or be attached for his debts. There is no reference to religion unless it be the invocation of the Deity to perpetuate the family name and to preserve their property, and the casual mention of unspecified **[630]** religious purposes, &c., at the end of the sentence last quoted. There is a gift to the poor and to widows and orphans, but they are to take nothing, not even surplus income, until the total extinction of the blood of the settlors, whether lineal or collateral.

It seems that in the High Court the learned Advocate-General contended for the plaintiffs that a gift to the donor's descendants without any mention of the poor might be supported as a *wakf*; and even that the Mahomedan law intends that perpetual family settlements may be made in the name of religious trusts. In the case of *Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* (1) this Board said: "They have not been referred to, nor can they find any authority showing that, according to Mahomedan law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other." The Board proceeded to affirm the decision of the High Court of Calcutta, who held that a small part of the property had been well devoted to charity, but that as to the bulk of it, the settlement was, notwithstanding some expressions, importing a *wakf*, in substance nothing but a family settlement in perpetuity, and as such contrary to Mahomedan law. The principle of this decision has been

(1) 17 C. 498 (509)=17 I. A. 28 (37).

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quoted and approved in a subsequent case, *Abdul Gafur* v. *Nizamudin* (1). This is a sufficient answer to the arguments used in the High Court.

Their Lordships, however, cannot now say that they have not been referred to any authority for the contrary opinion; for Mr. Branson has cited to them two cases in which there are very elaborate judgments delivered in the Calcutta High Court by the learned Judge, Mr. Ameer Ali. Those judgments are in accordance with the opinion expressed by him in his Tagore Lectures, and if their Lordships have rightly apprehended them, they do go the whole length of the Advocate-General's argument. One is in the case of *Mahomed Israil Khan* v. *Sashti Churn Ghose* (2) where there were some immediate gifts to the poor, and [631] the gift was upheld, and no further appeal was presented. The other case is that of *Bikani Mia* v. *Shuk Lal Poddar* (3), where there was no gift to the poor till after the failure of the settlor's family. It was heard by a Full Bench of five Judges, who decided that the deed was invalid, Mr. Justice Ameer Ali dissenting.

The opinion of that learned Mahomedan lawyer is founded, as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance, he quotes a precept of the Prophet Mahomed himself, to the effect that "A pious offering to one's family to provide against their getting into want, is more pious than giving alms to beggars. The most excellent of *sadakah* is that which a man bestows upon his family." And by way of precedent he refers to the gift of a house in *wakf* or *sadakah* of which the revenues were to be received by the descendants of the donor Arkan (4). His other old authorities are of the same kind.

As regards precedents, their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property, except that in the case cited the house seems to have been regarded with special reverence,—or of the family, or of the donor. As regards precepts, which are held up as the fundamental principles of Mahomedan law, their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument how it comes about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf*, in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any. It is true that the donor's absolute interest [632] in the property is curtailed and becomes a life-interest; that is to say, the *wakfnama* makes him take as *mutwali* or manager. But he is in that position for life; he may spend the income at his will, and no one is to call him to account. That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design.

Among the very elaborate arguments and judgments reported in *Bikani Mia's* case (3), some doubts are expressed whether cases of this

(1) 17 B. 1=19 I.A. 170.
(2) 9 C. 412.
(3) 20 C. 116.
(4) 20 C. 140.

1894 DEC. 15. — PRIVY COUNCIL. — 22 C. 619 (P.C.) = 22 I.A. 76 = 6 Sar. P.C.J. 572.

kind are governed by Mahomedan law; and it is suggested that the decision in *Ahsanulla Chowdhry's* case (1) displaced the Mahomedan law in favour of English law. Clearly the Mahomedan law ought to govern a purely Mahomedan disposition of property. Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahomedan law as known and administered in India; but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of *wakf*, as the learned Judge says they have. But it would be doing wrong to the great law-giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words.

Mr. Branson indeed did not contend for such sweeping conclusions, though, as in duty bound, he submitted the arguments which lead up to them. But he argued that where, as in this case, there is an ultimate gift for the poor, a perpetual family [633] settlement expressly made as *wakf* is legal. He had a right to argue that point as not being covered by the decision in *Ahsanulla Chowdhry's* case (1). This Board expressly left it open, because they found that contradictory views had been taken in India, and they did not desire to enter into that controversy in a case where the facts did not raise it. The facts of this case do raise it.

Having examined the authorities cited, their Lordships find a great preponderance against the contentions of the appellants. Some authorities go so far as to hold that for a valid *wakf* the property should be solely dedicated to pious uses. On that point however this Board in *Ahsanulla Chowdhry's* case (1) adopted the opinion of Mr. Justice Kemp to the effect that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. In favour of the view now urged for the appellants there is the judicial opinion of Mr. Justice Ameer Ali in *Bikani Mia's* case (2), dissenting from the rest of the Court; a *dictum* of Sir Raymond West in the Bombay High Court in the case of *Fatma Bibi* v. *The Advocate-General of Bombay* (3) and a decision of Mr. Justice Farran in the same Court in the case of *Amrutlal Kalidas* v. *Shaik Hussein* (4). The weight of Mr. Justice Ameer Ali's opinion on this subordinate point is somewhat lessened by his support of the gift under consideration on the very broad grounds which their Lordships have considered to be untenable. The *dictum* of Sir R. West is mentioned in *Ahsanulla Chowdhry's* case (1). Mr. Justice Farran had before him in *Amrutlal Kalidas* v. *Shaik Hussein* (4) a case very closely resembling the present one. He described the settlement as "a perpetuity of the worst and most pernicious kind, and would be invalid on that ground unless it can be supported as a *wakfnama*" (see p. 497 of the report), and

(1) 17 C. 498 = 17 I. A. 28.
(2) 20 C. 116.
(3) 6 B. 53.
(4) 11 B. 492.

1894 DEC. 15 — PRIVY COUNCIL. — 22 C. 619 (P.C.) = 22 I.A. 76 = 6 Sar. P.C J. 572.

he thought that the authority of the Hedaya is against it; but he adopted the principle stated by Sir R. West, which he treated as a decision, and he supported the gift on the strength of the ultimate trust for the poor.

[634] Their Lordships cannot assent to these conclusions. They make words of more regard than things, and form more than substance. In their judgment the Calcutta High Court have in this case rightly decided that there is no substantial gift to the poor. A gift may be illusory whether from its small amount or from its uncertainty and remoteness. If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognized as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position. Their Lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandizement of a family.

They will humbly advise Her Majesty to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Pemberton & Garth.*
Solicitors for the respondents: Messrs. *Sanderson, Holland & Adkin.*
C. B.

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22 C. 634.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Macpherson.

MAQBUL AHMED CHOWDHRY (*Defendant*) *v.* GIRISH CHUNDER KUNDU (*Plaintiff*).* [14th December, 1892.]

Bengal Tenancy Act (*VII of* 1885), s. 95—*Manager of estate—Obligation of manager to have his name registered before he can collect rent of estate—Land Registration Act* (*Bengal Act VII of* 1876), s. 78.

A person who has been appointed manager of an estate under the provisions of s. 95 of the Bengal Tenancy Act must have his name registered [635] under the provisions of s. 78 of the Land Registration Act before he can recover rent from the tenants of the estate of which he has been appointed manager.

[R., 8 Cr. L.J. 191 = 1 S.L.R. 73; 1 L.B.R. 316 (325); 85 P L.R. 1902 = 6 P.R. 1902 Cr; 2 Weir 301; D., 1 P.R. 1904 (Cr.) = 30 P. L. R. 1904; Rat. Unr. Cr. Cas. 799.]

IN this case the plaintiff, Girish Chunder Kundu, was a person who, owing to disputes amongst the co-owners, had been appointed by the Civil Court under s. 95 of the Bengal Tenancy Act to manage the estate of Ashanulla Chowdhry, Rahimulla Chowdhry, Bashirulla Chowdhry, and Rabatunessa Chowdhry, the last two being the names of deceased persons. The plaintiff sued for rent due to the estate; he sued first as manager on behalf of Ashanulla, Rahimulla and Bashirulla; but, subsequently, on his petition, the name of Rabatunessa was added; and, finally, also on his petition,

*Appeal from Appellate Decree No. 1790 of 1891, against the decree of F. A. Slack, Esq., District Judge of Chittagong, dated the 28th August 1891, affirming the decree of Babu Juggut Chandra Dass, Munsif of Sitakoondoo, dated the 11th July 1891.

the names of Bashirulla and Rabatunessa were struck out. The estate in respect of which the rent was claimed was a *taluk* held by the defendants under a *taraf* which stood in the Collector's register in the names of Ashanulla and Rahimulla Chowdhry only. The only issue material to this report was whether the plaintiff could sue for rent without having got his name registered as manager on the Collectorate register. The Munsif, holding that the registration of the name of the manager was not necessary, gave the plaintiff a decree.

The Judge, on appeal by the defendant, said :—

"With regard to this point, I am of opinion that the provisions of ss. 38 and 78 of the Land Registration Act will not apply in the present case, because the definition of the word 'manager,' as given in that Act, does not include the case of the present appointment, because 'manager' in that Act means every person who is appointed to manage any estate on behalf of a minor, idiot or lunatic, or on behalf of a religious or charitable foundation, and the defendant's pleader does not try to show or urge that any of the co-owners falls within the above category, or that the management is on behalf of a religious or charitable foundation. This being so, it does not appear to me that the present appeal can be decreed in favour of the defendant on the ground that the provisions of the Land Registration Act have not been complied with. I, therefore, decide this point against the defendant."

The Judge, therefore, dismissed the appeal.

The defendant appealed to the High Court.

Babu *Akhil Chunder Sen*, for the appellant.

Babu *Hem Chunder Banerjee*, for the respondent.

[636] The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

The question that we are called upon to decide in this case is whether a person who has been appointed the manager of an estate under the provisions of s. 95 of the Bengal Tenancy Act must have his name registered under the provisions of s. 78 of the Land Registration Act before he can recover rent due from tenants of the estate of which he has been appointed manager.

Section 78 of the Land Registration Act says: "No person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act." . . . . . In order to see who is required by this Act to cause his name to be registered within the meaning of s. 78, we must go back to ss. 38, 39, 40, 41, and 42, and the material section we have to consider is s. 42, which deals with managers who are appointed after the Land Registration Act came into force. Paragraph 3 of that section says: "Every person assuming charge after such commencement (that is, the commencement of the Act) of any estate or revenue-free property, or of any interest therein, respectively, as manager, shall, within six months from the date of such assumption of charge, make application in the manner hereinafter provided to the Collector of the district on the general register of which such estate or property is borne, or to any other officer who may have been empowered by such Collector to receive such applications, for registration of his name and of the character and extent of his interest

1892 DEC. 14. — APPELLATE CIVIL. — 22 C. 634.

as such proprietor or manager." This refers to every manager. Now 'manager' is defined by cl. 6, s. 3 of the Act. That clause says: 'Manager' means every person who is appointed by the Collector, the Court of Wards, or by any Civil or Criminal Court to manage any estate or revenue-free property, or any part thereof, and every person who is in charge of an estate or revenue-free property, or any part thereof on behalf of a minor, idiot or lunatic, or on behalf of a religious or charitable foundation." The Officiating District Judge was of opinion that the word 'manager' in this section meant only persons appointed to manage any estate. [637] &c., on behalf of a minor, idiot or lunatic, or on behalf of a religious or charitable foundation; in other words, he considered the word 'and' after the verb to be conjunctive and not disjunctive. That seems to us to be an erroneous interpretation of the section. The section seems to us to point to two classes of people: first of all to 'persons who are appointed by the Collector, the Court of Wards, or by any Civil or Criminal Court to manage any estate or revenue-free property, or any part thereof;' and, secondly, to 'persons who are in charge of estates or revenue-free property or any part thereof on behalf of a minor, idiot or lunatic, or on behalf of a religious or charitable foundation.' And that that is so appears from the fact that when the Land Registration Act was passed, Reg. V of 1812 was in force, and s. 26 of that Regulation provided for the appointment by *Zillah* or City Judges of a person to manage an estate where there were disputes between the proprietors; and the person so appointed, amongst others, is the person included in the first-half of the definition of manager in cl. 6 of s. 3 of the Land Registration Act.

The question is whether the 'manager' spoken of in s. 95 of the Bengal Tenancy Act who has to be appointed by the District Judge is in any different position from other managers. Now the 'manager' spoken of in the Land Registration Act is one to be appointed by the Civil Court amongst others. The District Judge appears to us to be entirely on the same footing as the Civil Court in the Land Registration Act. We would further point out that cl. 3, s. 98 of the Bengal Tenancy Act, provides that a manager shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might, but for his appointment, have exercised, and the co-owners shall not exercise any such power. It is clear that the collection of rent is part and parcel of the management of an estate, and it is so recognized in Reg. V of 1812. Section 26 of that Regulation, speaking of the things which comprise the management of an estate, says that one of them is to collect the rents. The collection of the rents is a material part of the management of an estate. When a manager is appointed, co-owners, even though their names are registered, cannot collect the rents, and unless a [638] manager is registered, there is no person to whom the tenants are liable to pay their rents.

In this view of the law, it appears to us that the decisions of both the lower Courts are erroneous, and must be set aside, and this suit dismissed with costs in all the Courts.

J. V. W. *Appeal allowed.*

22 C. 638.

1895 JUNE 3.

APPELLATE CRIMINAL.

22 C. 638.

APPELLATE CRIMINAL.

Before Mr. Justice Norris and Mr. Justice Beverley.

TORAP ALI AND ANOTHER *v.* QUEEN-EMPRESS.* [3rd June, 1895.]

Penal Code (Act XLV of 1860), s. 201—Causing disappearance of evidence of supposed murder—Want of proof of commission of offence.

Section 201 of the Penal Code applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself.

The accused were charged with murder, and also with causing the disappearance of the corpse of the deceased with the intention of screening the murderer from punishment under s. 201 of the Penal Code. The evidence for the prosecution pointed conclusively to one or other of them being the actual murderer; but it was impossible upon the evidence to say which of them caused the death. They were acquitted on the charge of murder, but convicted on the charge under s. 201. *Held* that the conviction could not stand.

THE appellants were charged with murder and also with the offence under s. 201 of the Penal Code. They were acquitted of murder, as there was no evidence to show which of the accused committed the murder, but were convicted on the charge under s. 201 of the Penal Code. They appealed against the order of conviction.

Babu *Chandra Kanto Sen*, appeared on behalf of the appellants.

The Deputy Legal Remembrancer (Mr. *Kilby*), on behalf of the Crown.

Babu *Chandra Kanto Sen.*—There is no evidence that the deceased was murdered. All that has been proved by the medical **[639]** evidence is that he was killed. Therefore it was not proved that any offence had actually been committed, nor has it been proved that the accused knew or had information sufficient to lead them to believe that any offence had been committed: See *Queen-Empress* v. *Abdul Kadir* (1), *Queen-Empress* v. *Fateh Singh* (2), *Queen-Empress* v. *Matuki Misser* (3). Then it has been laid down in several cases that a person cannot be convicted under s. 201 of the Penal Code if he himself is the principal offender: See *Queen* v. *Ramsoondar Shootar* (4), *Reg.* v. *Kashinath Dinkar* (5), *Queen-Empress* v. *Krishna* (6), *Queen-Empress* v. *Lalli* (7), *Queen-Empress* v. *Dungar* (8).

The *Deputy Legal Remembrancer* did not argue the case on behalf of the Crown.

The judgment of the Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The two accused were charged with the murder of one Moizuddeen, and also with causing the disappearance of his corpse with intent to screen the murderer from punishment under s. 201 of the Indian Penal Code.

The Judge found that there was no evidence to show which of the accused committed the murder, and he acquitted them both on that

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* Criminal Appeal No. 909 of 1894 against the order of A.E. Staley, Esq., Sessions Judge of Backergunge, dated the 22nd of November 1894.

(1) 3 A. 279. (2) 12 A. 432. (3) 11 C. 619.
(4) 7 W. R. Cr. 52. (5) 8 B.H.C. Cr. 126. (6) 2 A. 713.
(7) 7 A. 749. (8) 8 A. 252.

1895 JUNE 3. charge. He convicted them, however, on the charge under s. 201, and sentenced each of them to five years' rigorous imprisonment.

APPELLATE CRIMINAL. There was no pretence for implicating any one except the accused in the murder of Moizuddeen, and the evidence for the prosecution pointed conclusively to one or other of them being the actual murderer; but it was impossible, upon the evidence, to say which of them caused the death.

22 C. 638. The accused have appealed against the conviction under s. 201, and their learned Vakil contends that it cannot stand.

We think this contention must prevail. In *Queen* v. *Ramsoondar Shootar*(1), Kemp and Glover, JJ., said: "That section" (201) **[640]** "refers to persons other than the actual criminals, who, by their causing evidence to disappear, assist the principals to escape the consequences of their offence." In *Reg*. v. *Kashinath Dinkar* (2), Lloyd and Kemball, JJ., said: "Section 201 and the two following sections commence with precisely the same words thus: 'Whoever knowing or having reason to believe that an offence has been committed.' Now as there is no law which obliges a criminal to give information which would convict himself, it is evident that ss. 202 and 203 could not apply to the person who committed that offence, *i. e.*, 'the offence which he knew had been committed;' and s. 201 should, we think, be construed in a similar manner. And looking at the only illustration, which follows s. 201, it would appear that the law was intended to apply exclusively to 'another,' and we are, therefore, of opinion that the conviction of the accused as accessories to an offence, known or believed to have been committed by themselves, is illegal." In *Queen-Emprees* v. *Lalli* (3), Petheram, C.J., and Brodhurst, J., said: "In our opinion on the construction of the section the person who is concerned as a principal cannot be convicted of the secondary offence of concealing evidence of the crime."

In *Queen-Empress* v. *Dungar* (4), Brodhurst, J., said: "I do not feel called upon to express any opinion as to the way in which s. 201 of the Indian Penal Code should have been drawn. All that I conceive I have to do is to decide whether that section does or does not apply to a criminal causing disappearance of evidence of his own crime. The section is contained in Chap. XI, the heading of which is 'Of false evidence and offences against public justice.' The marginal note of s. 201 is 'causing disappearance of evidence of an offence committed or giving false information touching it to screen the offender.' This is a correct abbreviation of the section, and from the wording of the section itself, and for the reasons given by Mr. Justice Lloyd, there is not, in my opinion, any room for doubt that the section applies merely to the person who screens the principal or actual offender. There are several judgments of High Courts in India which **[641]** support this opinion, and I am not aware of any that are in conflict with it. All of these judgments have not been reported, but it is quite sufficient to refer to the following five rulings: *Queen* v. *Ramsoondar Shootar*(1), *Reg*. v. *Kashinath Dinkar*(2), *Queen-Empress* v. *Krishna* (5), *Empress* v. *Behala Bibi* (6), *Queen-Empress* v. *Lalli* (3). These rulings extend over a period of about nineteen years, and are by nine Judges of three of the High Courts. It is incredible that all of them can have escaped the notice of the Legislature; and it is therefore reasonable to suppose that the section would have been

(1) 7 W. R. Cr. 52. (2) 8 B. H. C. Cr. 126. (3) 7 A. 749.
(4) 8 A. 252. (5) 2 A. 713. (6) 6 C. 789.

amended had its meaning been misinterpreted by so many Judges of at least three of the High Courts in India."

There are other cases to the same effect to which it is not necessary to refer.

The convictions must be set aside and the appellants acquitted and discharged.

S. C. B. *Conviction set aside.*

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22 C. 641.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Stevens.

DEBI DAS CHOWDHURI (*Plaintiff*) v. BIPRO CHARAN GHOSAL AND OTHERS (*Defendants*).* [2nd and 3rd April, 1895.]

Sale for arrears of revenue—Sale of share of Hindu widow—Act XI of 1859, s. 54—*On the sale of a share in an estate for arrears of revenue the reversion is lost.*

Where a share of an estate held by a Hindu widow was sold for arrears of revenue it was contended that, under s. 54 of Act XI of 1859, the estate acquired by the purchaser lasted only during the lifetime of the widow.

Held, that the purchaser did not take any interest limited to the life of the widow, but that the entire share passed by the sale.

[F., 7 C.L.J. 1 (19); 11 C.W.N. 821 (824); R., 15 C.L.J. 436=16 C.W.N. 587 (589)=14 Ind. Cas. 219.]

SATANMANI, a Hindu widow, had a life interest in a share of a zemindari called Chandpara. Her share having been sold by the **[642]** Collector for arrears of revenue, the plaintiff Debi Das Chowdhry, who was the reversionary heir after the expiration of the widow's interest, brought this suit after her death, alleging that, under the provisions of s. 54 of Act XI of 1859, as Satanmani had only a life interest, the purchaser had no right to hold possession after her death of that share of the zemindari which had been sold. It was held by the District Judge of Beerbhoom that upon the sale of the share the reversion was lost. From this decision the plaintiff appealed to the High Court.

Babu *Nilmadhub Bose*, Babu *Hari Mohun*, Babu *Sarada Prossanna Roy*, and Babu *Karuna Sindhu Mukerjee*, for the appellant.

Dr. *Rash Behari Ghose* and Babu *Sarat Chundra Dutta*, for respondent No. 1.

Babu *Promatha Nath Sen* (for Babu *Sreenath Dass*), for respondents Nos. 2 and 3.

Babu *Bepin Behari Ghose*, for respondent No. 4.

Babu *Nalini Ranjan Chatterjee*, for respondent No. 9.

The material portion of the judgment of the High Court (PIGOT and STEVENS, JJ.) was as follows:—

JUDGMENT.

PIGOT, J.—We do not propose to call upon the respondents, and we do not think that this is a case in which it is necessary to put the parties to the inconvenience of awaiting a written judgment.

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* Appeal from Original Decree No. 264 of 1892, against the decree of J. Whitmore, Esq., District Judge of Beerbhoom, dated the 8th of July 1892.

1895 APRIL 3. — APPELLATE CIVIL. — 22 C. 641.

It is not necessary for us to attempt any narrative of the circumstances of the case which are somewhat complicated in their detail. Those circumstances are fully set out in the judgment of the learned Judge, and we have only to deal with four points which arise upon the statements of the learned pleader for the appellant before us, and what we say will arise from the facts stated in the judgment of the learned Judge.

The points with reference to Chandpara are two-fold: As to one, it is said that the defendants Nos. 2 and 3 have not got as against the plaintiffs a good title to the share held as a Hindu widow by Satanmani, inasmuch as under s. 54 of Act XI of 1859 no more than the right possessed by her passed to the purchaser, and that her right consisted only of that Hindu widow's estate which [643] of course ended with her life; and that contention is founded upon these words in s. 54: "The purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." It is contended that here the previous owner having been a Hindu widow the purchaser did not purchase any estate which lasted longer than her lifetime.

We do not think that that is the meaning to be attributed to this section. The sale in question took place under the provisions of s. 13, which is applicable to sales of separate shares in respect of which separate accounts have been kept. Section 13 provides that in such cases the Collector shall put up for sale "only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due;" and the final sentence of s. 13 contains the words: "The share or shares sold, together with the share or shares excluded from the sale, shall continue to constitute one integral estate, the share or shares sold being charged with the separate portions or the aggregate of the several separate portions of *jamma* assigned thereto." We think that that passage in s. 13 throws sufficient light upon anything that is doubtful, if there be anything doubtful, in s. 54. It is plain that as the result of a sale under s. 13 it is contemplated that the whole share in respect of which the arrear may have been due shall pass to the purchaser; and that confirms the impression which, upon reading s. 54 alone, one would be disposed to form with regard to its meaning that the words "shall not acquire any rights," in that section refer to the acquisition of rights in respect of interest, such as encumbrances or the like, which are referred to in the previous phrase of that section. We therefore are of opinion that the entire share passed upon the sale for arrears of revenue under s. 54, and that the purchaser did not take any interest limited to the life of Satanmani.

[The remainder of the judgment proceeded on points not material to this report.]

22 C. 644.

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22 C. 644.

[644] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Stevens.

RAM SADAY MUKERJEE AND OTHERS (*Decree-holders*) *v.* DWARKA NATH MUKERJEE (*Judgment-debtor*).* [18th April, 1895.]

Bengal Tenancy Act (*VIII of* 1885), *sch. III, art.* 6—*Limitation Act* (*XV of* 1877), *art.* 179—*Execution of decree—Period from which limitation runs—Date of decree—Date of payment.*

On the 26th of May 1890, a rent decree was passed for the sum of Rs. 400, payable on the 15th August 1890. On the 9th August 1893 the decree-holders applied for execution of the decree:

Held, the period of limitation ran from the date of the decree and not from the date fixed for payment, and that the application was barred by art. 6 of sch. III, Act VIII of 1885.

ON the 26th May 1890 the appellants obtained a consent decree for rent for Rs. 400. The amount decreed was made payable on 15th August 1890. An application for execution of this decree was made on the 9th August 1893, when the objection was taken by the judgment-debtor that the decree was barred by limitation under art. 6, sch. III of Act VIII of 1885. This objection was allowed and the application for execution dismissed by the First Munsif of Bankura, and on appeal his order was affirmed by the Officiating District Judge.

Dr. *Rash Behari Ghose* and Babu *Nalini Ranjan Chatterjee*, for the appellants.

Babu *Degamber Chatterjee*, for the respondent.

Dr. *Rash Behari Ghose*.—The expression 'date of the decree' in art. 6, sch. III, Bengal Tenancy Act, means the date fixed by the decree for payment. In *Sakharam Dikshit* v. *Ganesh Sathe* (1) West, J., says: "In the case of a decree payable by instalments it has been repeatedly held that as the command of the Judge prescribes a term for the performance of the several parts of his order, it is to be construed as becoming a judgment for purposes of limitation as to each instalment only on the day when [645] the payment is to be made." This applies to the present case where the entire sum decreed is made payable at a certain date. My contention is borne out by the cases of *Lakshmibai Bapuji Oka* v. *Madhavrav Bapuji Oka* (2) and *Gureebullah Sirkar* v. *Mohun Lall Shaha* (3).

Babu *Degamber Chatterjee*, for the respondent—The words 'date of decree' should be taken in their natural sense. By art. 179 of the Limitation Act six periods are fixed from which limitation begins to run. The sixth is 'where the application is to enforce any payment which the decree or order directs to be made at a certain date, such date."

This is omitted from art. 6 of the third schedule of the Bengal Tenancy Act in which the first three periods of art. 179 are incorporated; and as the Limitation Act is referred to in art. 6, it must be taken to have been deliberately omitted. In *Mamtazul Huk* v. *Nirbhai Singh* (4), the case of *Gureebullah Sirkar* v. *Mohun Lall Shaha* (3) was dissented from, and it was held that the expression 'date of such judgment,' in s. 58, Bengal Act

* Appeal from Appellate Order No. 156 of 1894, against the order of B. G. Geidt, Esq., Officiating District Judge of Bankura, dated the 2nd of February 1894, affirming the order of Babu Tara Charan Sen, Munsif of Bankura, dated the 2nd of December 1893.

(1) 3 B. 193 (196). (2) 12 B. 65. (3) 7 C. 127. (4) 9 C. 711.

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VIII of 1869, should be taken in its ordinary sense as meaning the date on which the judgment was passed.

JUDGMENT.

The judgment of the Court (PIGOT and STEVENS, JJ.) was delivered by

PIGOT, J.—In this case a decree was made in a suit instituted under the Bengal Tenancy Act on the 26th May 1890, ordering the sum of Rs. 400 on account of rent claimed in the suit to be paid in the month of Sraban following, that is to say, the following August. We think there is no doubt upon the face of the decree that the suit was brought under the Bengal Tenancy Act; and although the decree was had by consent, that makes, we think, no difference upon the question arising before us.

On the 9th August 1893 an application for execution was made, and it was contended that the application was barred by limitation under the provisions of art. 6, Part III, sch. III of the Bengal Tenancy Act, inasmuch as more than three years had [646] passed since the date of the decree at the time when the application was made for execution, on the 9th August 1893. The First Munsif of Bankura accepted the contention that was raised, and dismissed the application; and on appeal his order was affirmed by the Officiating District Judge.

It is contended in appeal before us that, notwithstanding the express words of art. 6 of the Limitation Schedule of the Bengal Tenancy Act, those words should be so read as to cause limitation to run, not from the date of the decree or order, but from the date fixed by the decree for the payment of the sum mentioned in it, and authorities are cited before us [*Sakharam Dikshit* v. *Ganesh Sathe* (1), *Lakshmibai Bapuji Oka* v. *Madhavrav Bapuji Oka* (2) and one or two cases of this Court] relating to the provisions of former Limitation Acts as affecting similar questions.

We do not think it necessary to enter upon a discussion of the authorities that were cited to us, and for this reason. The result of the light thrown upon the effect of the successive Limitation Acts by the decisions of the Courts was the enactment of the Act of 1877, art. 179. In art. 179 a period of three years was allowed for the execution of a decree or order of any Civil Court not provided for by No. 180, or by the Code of Civil Procedure, s. 230, and there are various periods fixed in that article according to circumstances from which the three years so provided shall run. The first is the date of the decree or order; and this and the second and third are incorporated in art. 6, Part III, sch. III of the Bengal Tenancy Act; and there are three others which are not so incorporated; and the last of these three, namely, the 6th, provides for a case where a certain date is fixed by the decree for the payment of the money decreed, that is to say, where the application is to enforce any payment which the decree or order directs to be made at a certain date, from such date the three years are to run. Now the Limitation Act of 1877 is referred to in art. 6 of the Limitation Schedule of the Bengal Tenancy Act. It is obvious that the Legislature in framing the [647] schedule of limitation for the Bengal Tenancy Act, had art. 179 before it, and we must suppose that the Legislature deliberately abstained from making, in the Tenancy Act, any provision such as is contained in the sixth paragraph of the third column of art. 179 of the Limitation Act of 1877, that is to say, that having before it the question whether or not the three years'

(1) 3 B. 193. (2) 12 B. 65.

limitation should run from a date fixed by the decree for the payment of the decretal money (where the decree was in that form), the Legislature deliberatly abstained from making any such provision, and fixed the date of the decree or order as the date from which the three years were to run. Under these circumstances we see no alternative save to construe the words, the date of the decree or order, in their natural sense, and to hold that whatever hardship or inconvenience might arise in some cases from the three years' limitation running from the date of the decree and not from the date, if such there be, on which the decree directs the payment to be made, that is the law, and the appellant's contention cannot succeed.

We have not thought it necessary to base our decision upon the Full Bench decision in *Mamtazal Huq* v. *Nirbhai Singh* (1), although no doubt the construction of the words of the section of the Act of 1869, which is there adopted, coincides with the construction which we feel bound to give to the words of the Bengal Tenancy Act Limitation article in the present case. But we think what we have said is enough to show that by the terms of the Bengal Tenancy Act we are completely bound to come to the decision at which we have arrived.

We therefore dismiss the appeal with costs.

F. K. D. *Appeal dismissed.*

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22 C. 648.

[648] ORIGINAL CIVIL.

Before Mr. Justice Sale.

MANICK LALL SEAL, MINOR, BY HIS NEXT FRIEND PUNNA LALL ADDY (*Plaintiff*) *v.* SURRUT COOMAREE DASSEE, WIDOW AND ADMINISTRATRIX TO THE ESTATE AND EFFECTS OF PUNNA LALL SEAL, DECEASED, AND ANOTHER (*Defendants*).* [28th May, 1895.]

Receiver—Attorney, Improper conduct of—Agreements entered into with one party to a suit—Administrator-General's Act (II of 1874)*—Infant.*

A Receiver appointed by the Court entered into two private agreements, one prior to, the other subsequent to, the date of his appointment, with one of the defendants in the suit, restricting and controlling his powers. Neither agreement was at any time brought to the notice of the Court: *Held*, this was a gross contempt of Court, for which the parties were liable to committal. A Receiver is a servant of the Court, and has only such power and authority as the Court may choose to give him.

[R., 30 C. 696 (698); 61 P.L.R. 1902.]

THIS was an application in the above suit by William Henry Ryland, the Receiver of the moveable and immoveable estate of Punna Lall Seal, deceased, for leave to lay certain matters before the Court, and subject to the terms and conditions of two agreements, dated the 10th September 1894 and the 4th October 1894, so far as they were not inconsistent with the order of the Court, dated the 11th September 1894, to be allowed to act as Receiver of the estate.

The Receiver, William Henry Ryland, was appointed by the Court Receiver of the estate on 11th September 1894, by consent of all the parties in the suit; but it appears that, at the time of the order of appointment being made by the Court, two private agreements were entered into

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* Suit No. 338 of 1883.

(1) 9 C. 711.

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between Sreemutty Surrut Coomaree Dassee, widow of Punna Lall Seal, one of the defendants in the suit, and W. H. Ryland, containing the terms on which W. H. Ryland was required to act as Receiver. The first agreement was dated 10th September 1894 and was drawn up and prepared by Messrs. Remfry and Rose, attorneys for the defendant Surrut Coomaree Dassee. Subsequently a second agreement, prepared by the same firm of attorneys, slightly modifying the first agreement, **[649]** and dated the 4th October 1894, was executed by the same parties, W. H. Ryland and Surrut Coomaree Dassee. Neither of these two agreements had ever been, up to the present time, brought to the notice of the Court.

In a petition put forward in support of his application, the petitioner W. H. Ryland stated :—

1. That, on the 21st July 1884, the Administrator-General of Bengal became the Administrator to the estate of Punna Lall Seal, deceased, under a transfer of letters of administration made to him by the defendant Surrut Coomaree Dassee, the widow and administratrix of the estate of the deceased, by a deed of transfer and other acts done pursuant to s. 31 of the Administrator-General's Act II of 1874.

2. That your petitioner was appointed manager of the estate of Punna Lall Seal in April 1894 under the said Administrator-General of Bengal, acting as Administrator of the estate of the deceased.

3. That the estate was then, and had been for several years previously, involved in a course of litigation, which litigation has lately been brought to a close.

4. That, while negotiation for a settlement of the litigation were pending, proposals were made by the defendant, Surrut Coomaree Dassee, to your petitioner for the appointment of your petitioner as a private Receiver to the estate, and such appointment was approved by the Administrator-General, who agreed to make over the estate to your petitioner, upon an order being obtained for the purpose.

5. That, previous to the order for appointment of your petitioner as Receiver being applied for, the attorneys for Surrut Coomaree Dassee caused to be prepared an agreement containing the terms upon which they required your petitioner to act as their Receiver, and such agreement was signed by your petitioner and bears date the 10th September 1894 (a copy of which is hereunto annexed and marked A).

6. That on the 11th September 1894, a consent order was made in this suit for the appointment of your petitioner as Receiver, (a copy of which is hereunto annexed and marked B).

7. That the attorneys for Surrut Coomaree Dassee, having afterwards suggested a modification of the agreement, your petitioner executed a further Memorandum, which bears date the 4th October 1894, (a copy of which is hereunto annexed and marked C).

8. That your petitioner consented to enter into the aforesaid agreement with the object of protecting himself from unnecessary litigation, and without intending that his duties as Receiver should be affected in any way.

9. That your petitioner has given security to the satisfaction of the **[650]** Registrar of this Honourable Court, but has not yet taken over charge of the estate as Receiver.

10. That the said Registrar, having been informed by your petitioner that he had entered into the said agreement, said that the agreements

were improper, and that your petitioner could not, as a Receiver, act under them.

11. That your petitioner has since been advised by counsel to lay the matter before this Honourable Court.

12. That on the 26th March 1895 your petitioner wrote to the attorneys of the defendant Surrut Coomaree Dassee, asking them to move in the matter, but has received no reply; (a copy of this letter is hereunto annexed and marked D).

Your petitioner, therefore, prays for an order that he may be at liberty to take charge of the estate and act as Receiver thereof, subject to the terms of the said agreements, so far as the same may not be inconsistent with the order of the Court, dated 11th September 1894, or as far as the terms of the said agreement may be sanctioned, or for such order as, under the circumstances hereinbefore stated, this Honourable Court may deem fit.

The first agreement, dated 10th September 1894, between Surrut Coomaree Dassee of the one part and W. H. Ryland of the other part, was as follows:—

" Whereas Babu Punna Lall Seal, who was one of the five sons of the late Babu Mutty Lall Seal, of Colootollah, in Calcutta aforsaid, died, on the 24th day of September 1878, intestate, leaving him surviving the said Surrut Commaree Dassee, his sole widow, a daughter named Nittomoney Dassee by the said Surrut Coomaree Dassee, and two grandsons and five granddaughters by the said daughter, and leaving considerable moveable and immoveable property both in Calcutta and in different districts of Bengal.

And whereas the said Surrut Coomaree Dassee applied for and, on the 21st day of January 1879, obtained letters of administration to the said estate of the said Punna Lall Seal from the High Court of Judicature at Fort William in Bengal in its Testamentary and Intestate Jurisdiction.

And whereas the said Surrut Commaree Dassee entered into possession of the said estate, and on the 26th of November 1877, she, in pursuance of an authority in that behalf, given by the said Punna Lall Seal duly adopted Manick Lall Addy, now Manick Lall Seal, as a son unto the said Punna Lall Seal, and the said Manick Lall Seal became entitled thereupon to his said estate as his sole heir.

And whereas by an order made by the said High Court in the matter of the said Manick Lall Seal, an infant, on the 10th October 1882, the said Surrut Commaree Dassee was appointed the guardian of the person and estate of the said Manick Lall Seal, subject to her giving security to the satisfaction of the Registrar of the said High Court, which she did on the 4th of April 1883.

[651] And whereas by a deed of assignment, dated the 21st day of July 1894, the said Surrut Coomaree Dassee purported to transfer to Mr. L. P. D. Broughton, the then Administrator-General of Bengal, all the estates and effects and interest vested in her by the said letters of administration, but the said deed contained no specification of the said estate.

And whereas the said estate of the said Punna Lall Seal has been since the date of the said deed and is now in the possession of the said Administrator General.

And whereas the said Surrut Coomaree Dassee is about to apply to the High Court for an order for the appointment of a private Receiver to be nominated by her to take charge of the entire estate of the said Punna

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Lall Seal, and that the said Administrator-General should deliver possession thereof to such private Receiver.

And whereas the said W. H. Ryland has, at the request of the said Surrut Coomaree Dassee, agreed to act as such private Receiver as aforesaid, upon his being so appointed by the said High Court, subject to the terms and conditions hereinafter contained.

Now it is hereby mutually agreed between the said parties hereto as follows :—

1. That this agreement shall only come into force and effect, when the said W. H. Ryland shall be appointed by the said High Court Receiver of the immoveable property and of the rents and profits of the immoveable property of the said Punna Lall Seal, deceased.

2. The said W H. Ryland, when so appointed private Receiver as aforesaid, shall devote the ordinary business hours of the day to the business of the estate of the said Punna Lal Seal.

3. The said W. H. Ryland, shall be entitled, as remuneration for his services as such private Receiver as aforesaid, to a salary for Rs. 500 per mensem, and shall in addition, be entitled to the use, whilst he shall continue as such Receiver as aforesaid, of a carriage and horse, to be provided at the expense of the said estate, and also to all necessary travelling expenses, when he may visit the Mofussil for the business of the said estate.

4. The said W. H. Ryland shall also, at the expense of the said estate, be provided with suitable office accommodation and with a suitable and necessary staff or establishment at Calcutta, to enable him to efficiently discharge his duties as such Receiver. The total amount of the expenses of such establishment at Calcutta shall, if necessary, be settled by the Registrar of the High Court, when settling the order appointing the said W.H. Ryland as such Receiver.

5. All monies realized by the said W. H. Ryland in the said estate shall, as received, be deposited in the Bank of Bengal in the name of the said W.H. Ryland, as such Receiver as aforesaid, and all monies required to be expended shall be drawn by him by cheques on such banking account.

[652] 6. That after providing for the maintenance of the said Surrut Coomaree Dassee and of the said son, and the payment of Government Revenue and cesses, Municipal rates, assessments, rents, due to superior landlords, establishment, law charges, repairs to houses, the interest on loans and other necessary expenses, the said W. H. Ryland shall, at the close of each and every year, invest any surplus of the monies belonging to the said estate in Government Promissory Notes of the $3\frac{1}{2}$ per cent loan, and which said Government securities shall stand in the name of the said W. H. Ryland as such Receiver as aforesaid, and shall be deposited for safe custody in the family house under lock and key of the said Receiver.

7. All receipts for rents, whether of the Calcutta or Mofussil properties, or for any monies whatsoever, payable to the said estate, shall bear the signature of the said W. H. Ryland as such Receiver as aforesaid, and shall also bear the seal of the said Surrut Coomaree Dassee.

8. The said W.H. Ryland shall monthly and every month submit to the said Surrut Coomaree Dassee a statement of the receipts and disbursements of the said estate for the preceding month for her information,

9. The said W. H. Ryland will, in all important matters connected with the said estate, consult the said Surrut Coomaree Dassee, and keep her from time to time fully informed of the affairs of the said estate.

10. The said W. H. Ryland shall have exclusive power to employ and dismiss the servants of the said estate, and the said Surrut Coomaree Dassee shall not in any way interfere with the authority of the said W. H. Ryland in this respect.

11. Should the said Surrut Coomaree Dossee be desirous at any time of discharging the said W. H. Ryland as such Receiver as aforesaid and of appointing another Receiver in his place and stead, he, the said W. H. Ryland, will not in any way oppose or object to any application which may be made to the said High Court for such purpose, but if the said W. H. Ryland shall, at the instance of the said Surrut Coomaree Dassee, be discharged from acting as private Receiver as aforesaid, within three years from his appointment as such, then and in such a case the said Surrut Coomaree Dassee shall pay to the said W. H. Ryland the sum of Rs. 6,000 as and by way of compensation, unless the removal of the said W. H. Ryland shall have been brought about by any serious misconduct or mismanagement on the part of the said W. H. Ryland.

A second private agreement, modifying slightly the terms of the first agreement, was drawn up by Messrs. Remfry and Rose, the attorneys of Surrut Coomaree Dassee, and executed by Surrut Coomaree Dassee and W. H. Ryland, to the following effect:—

1. That the office accommodation of the said W. H. Ryland referred to in para. 4 of the said agreement shall be in the vicinity of the residence of **[653]** the said Surrut Coomaree Dassee, and in the event of a permanent family dwelling-house being secured for the residence of the said Surrut Coomaree Dassee and her son Manick Lall Seal, suitable office accommodation shall be provided therein for the said W. H. Ryland and his office staff.

2. Instead of investments in Government paper being made at the close of the year by the said W. H. Ryland, as provided for in para. 6 of the said agreement, they shall be so made as opportunity shall from time to time permit.

3. In all other respects the said agreement shall continue unaltered.

On the 26th March 1895 a letter was written by W. H. Ryland to Messrs. Remfry and Rose as follows:—

MESSRS. REMFRY & ROSE. 26*th March* 1895.

DEAR SIRS,—With reference to your letter of the 23rd instant I am unwilling to proceed with the application, of which I gave you notice, and therefore withdraw it; but I am advised that I ought not to act as Receiver, until the Court is informed of the position in which I am placed. As Receiver I should, of course, endeavour to meet the wishes of the beneficiaries, as far as it is possible to do so, consistently with my duty as an Officer of the Court, but I have been asked to consent to terms which may not be regarded with approval by the Court. As I am advised that the Court should be informed of those terms, I shall be glad if you will take the initiative and submit the matter to the Court.

This may be done by an application to the Court, that I may be permitted to take charge, subject to the agreement in question. In that case I need not even appear.—(Signed) W. H. RYLAND.

No reply to this letter was received from Messrs. Remfry and Rose, and, in consequence, on the 20th May, W. H. Ryland, through his

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attorney, Mr. Swinhoe, served a notice on the attorneys of all the parties interested, and made this application to the Court.

Mr. *Henderson*, for the applicant, W. H. Ryland.

Mr. *Caspersz*, for the Administrator-General of Bengal.

Mr. *T. A. Apcar*, Mr. *Mitter*, and Mr. *Chakravarti*, for Surrut Coomaree Dassee.

Mr. *Garth*, for the infant Mânick Lall Seal, and Messrs. Gillanders, Arbuthnot & Co. (mortgagees).

[In the course of the hearing, Mr. *Apcar*, on behalf of Surrut Coomaree Dassee, stated that she was prepared now to unreservedly withdraw the agreements, having regard to the views expressed by the Court.]

ORDER.

SALE, J.—This is an application by a Receiver appointed by an order, dated 11th September 1894. The object is to bring to **[654]** the notice of the Court certain facts connected with his appointment, and to ask for the directions of the Court under the circumstances. The estate in suit is the estate which was of the late Punna Lall Seal. The plaintiff is his adopted son, having been adopted after his death by his widow Surrut Coomaree Dassee. The suit was instituted against Surrut Coomaree Dassee for the purpose of obtaining administration of the estate and a declaration of the plaintiff's rights. In 1879 Surrut Coomaree obtained letters of administration of her husband's estate, and, by virtue thereof, entered into possession of the estate and managed it from 1879 to 1884. Then by a deed, dated 21st July 1889, executed by her under s. 31 of the Administrator-General's Act, II of 1874, she transferred the estate to the Administrator-General, who, on the same day, was also appointed Receiver of the estate and has been in possession ever since. It appears that the Administrator-General acted as Receiver until he was discharged by an order dated 19th March 1888.

A decree was made in this suit on the 3rd of December 1889, declaring the rights of the plaintiff, as the adopted son of Punna Lall Seal, and that Surrut Coomaree was entitled to maintenance out of the estate, and directing certain enquiries. This decree was followed by various proceedings, to which it is unnecessary to refer particularly. Finally a scheme was proposed, by which it was intended to raise a considrable sum of money for the purpose of paying off the liabilities of the estate, and it was a part of the scheme that for the future the estate should be managed by a Receiver to be appointed by the Court.

Under that scheme Mr. W. H. Ryland was proposed as a fit person to be appointed Receiver, and it now appears that Surrut Coomaree's assent to his appointment was given on certain conditions, then undisclosed, which were embodied in an agreement signed by her and Mr. Ryland. It is not necessary to refer to all the terms of the agreement. It is sufficient to say that the object was to place in the hands of Surrut Coomaree very extensive control over the Receiver in the management of the estate. One of the clauses provided that all receipts for collection should be signed by the Receiver, and should also bear the seal of Surrut Coomaree.

[655] Another clause provided that Surrut Coomaree should have the right of dismissing the Receiver at any time, without objection on his part, subject only to the condition that, if she exercised that right within three years from the appointment of the Receiver, she would pay him the sum of Rs. 6,000.

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When Surrut Coomaree applied for the appointment of Mr. Ryland, as Receiver, she filed a petition, the 22nd paragraph of which is as follows: "That your petitioner has arranged with Mr. W. H. Ryland, No. 15, Kyd Street, in Calcutta, who was at the time of his retirement from Government service acting as Superintendent of Stamps and Stationery, and who was formerly for some time manager of the estate of Baboo Gopal Lall Seal, a co-sharer of the said Punna Lall Seal, and who has for some time past been the manager of the said estate of the said Punna Lall Seal under the said Administrator-General, to act as such private Receiver as aforesaid, subject to the sanction and approval of this Honourable Court at a monthly salary of Rs. 500, a suitable carriage and horse being provided for the use of the said Mr. W. H. Ryland, and he being provided with suitable office accommodation and a suitable establishment for both the Sudder and the Mofussal kutcherries."

Now I would observe that this statement of the arrangement is wholly of a misleading character. The suggestion is, that this is a fair and full statement of the arrangement; whereas it is obvious that the most objectionable features of the arrangement are omitted from that statement.

Upon the petition of Surrut Coomaree, to which no objection was suggested, an order was made for the appointment of Mr. Ryland as Receiver. Then a fresh agreement was entered into, which also was not brought to the notice of the Court, the effect of which was to modify the previous agreement in some minor particulars. Subsequently, but before Mr. Ryland took charge of the estate, his attention was called to the grave impropriety of the Receiver having come to an arrangement with a party to the suit, which had not been brought to the notice of the Court, the object of which was to allow the parties, or one of them, opportunities of very serious interference with the management of the property. A correspondence ensued between Mr. Ryland and Messrs. [656] Remfry and Rose, the attorneys for Surrut Coomaree, in which Mr. Ryland insisted that notice of the agreements should be given to the Court, and the Court's directions obtained in respect of his appointment. On the other hand, Messrs. Remfry and Rose, on behalf of their client insisted either that Mr. Ryland should abide by the agreements entered into, and, "loyally," as they put it, carry them out, or resign his appointment.

There is one circumstance of which I was informed by Surrut Coomaree's counsel, and have omitted to mention, namely, that one of the original clauses of the agreement provided that the Receiver should employ Messrs. Remfry and Rose as attorneys for the estate. This clause was objected to and was properly struck out, but it shows that, while it was intended to obtain for Surrut Coomaree an advantage in respect of the management of the estate, it was also intended to secure to her attorneys a benefit in the form of professional employment in connection with the estate.

Now the first question is as to what effect these agreements ought to have on Mr. Ryland's appointment as Receiver. I have no hesitation in expressing my opinion that the parties concerned in making the agreements were guilty of gross contempt of Court, for which they were each and all liable to committal. It is clearly a gross fraud on the Court to put forward a person as Receiver, who has come to a secret arrangement of this character with one of the parties to the suit. There can be no doubt that, if before the appointment, the Court had been aware that the parties intended by a secret arrangement between themselves to control the

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conduct of the Receiver, the appointment would not have been made. It cannot be too clearly understood that a Receiver appointed by the Court has only just such power and authority to manage the property committed to his charge as the Court may choose to give him. He is a servant of the Court and not of the parties to the suit, and any interference with his management by a secret agreement, whether come to before or after the appointment, is nothing short of an interference with the Court in the management of the estate. The party so interfering renders himself liable to the penalties of contempt. The question however is, whether, under the circumstances, I ought to allow the fact that the Receiver has, without the knowledge of the Court, [657] entered into these agreements, to operate as a permanent disqualification. In the first place, when I indicated my views of these agreements, the parties at once expressed themselves willing to withdraw them, and have done so. That is a circumstance to which, I think, I ought to give due weight. Further, in the affidavits filed by the Receiver and by Surrut Coomaree, they both say in effect that they were not aware that, in entering into the agreements, they were doing anything improper, nor did they intend that the agreements should have the effect of interfering with the due discharge by the Receiver of his duties. In a letter written by Messrs. Remfry and Rose on behalf of Surrut Coomaree to Messrs. Carruthers and Co., acting as attorneys for Mr. Ryland, they say: "It is to be regretted that it did not occur to us, or to Mr. Ryland, to bring the agreement to the notice of the Court at the time." Now if it be that the impropriety of conduct of the parties in making these agreements was not present to the mind of Messrs. Remfry and Rose, who are attorneys of experience, it perhaps is not singular that it should not have occurred either to Mr. Ryland or to Surrut Coomaree that they were doing anything improper in making the agreements. They might well have thought that if there was any impropriety in their conduct, the attorneys acting in the matter would have been aware of it, and have warned them. However willing I may be to accept the assurances of Mr. Ryland and Surrut Coomaree that they were acting *bona fide* in becoming parties to the agreements, I am bound to say that I find it very difficult indeed to accept any such assurance on behalf of the attorneys. That they should have been unaware that there was anything improper in the agreements entered into by the parties with their assistance, is, I confess, as incomprehensible as it is inexcusable.

Accepting, then, Mr. Ryland's assurance that he was entirely unaware that he was doing anything contrary to or inconsistent with the proper discharge of his duties as Receiver, and looking to the fact, admitted on all hands, of his special fitness for the management of this estate, it seems to me that I shall be doing the best for the estate, if I abstain from removing him from the office of Receiver and permit him forthwith to take charge of the estate. That is the order I propose to make on this application.

[658] Mr. Garth applied on behalf of a corporation stated to have advanced money in pursuance of the scheme, to which I have referred. I said then that I thought he had no *locus standi*. I am still of that opinion.

As to the costs of this application, they certainly ought not to be borne by the estate. I shall make no order as to the Receiver's own costs, but as regards the costs of the plaintiff and of the Administrator-General they must be paid by Surrut Coomaree, who proposed the original agreement and adhered to it until the hearing of the application, when it was withdrawn.

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I feel bound to add, that if the attorneys in this matter had done their duty to the Court, as they ought, this application would not have been necessary, and the parties would not have been put to the costs occasioned thereby.

Attorney for the plaintiff: Babu *Bhoopendra Nath Bose.*

Attorney for the defendant, the Administrator-General of Bengal: Mr. *Swinhoe.*

Attorneys for the defendant, Surrut Coomaree Dassee: Messrs. *Remfry & Rose.*

Attorneys for the mortgagees, Messrs. Gillanders, Arbuthnot and Co.: Messrs. *Sanderson & Co.*

C. E. G.

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22 C. 658.

APPELLATE CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Ghose and Mr. Justice Rampini.

TEJENDRO NARAIN SINGH (*Plaintiff*) v. BAKAI SINGH AND OTHERS (*Defendants*).* [6th March, 1895.]

Contract Act (IX of 1872), s 74—Penalty—Suit by a joint proprietor for arrears of rent—Bengal Tenancy Act (VIII of 1885), s 29 (b), Kabuliat executed prior to—Covenant for a higher rate—Bengal Act VIII of 1869, s. 5.

In a *kabuliat* executed in 1881, it was stipulated that, upon the expiry of the term of seven years fixed therein, a fresh lease should be executed; that, [659] should the defendant cultivate the lands without executing a fresh *kabuliat*, he would pay rent at the rate of Rs. 4 a bigha (a rate much higher than that fixed for the term). No fresh *kabuliat* was executed on expiry of the term, and the plaintiff, a part proprietor, collecting rent separately, brought this suit for arrears of rent at the new rate of Rs. 4. The defendant objected *inter alia* that the plaintiff being a part proprietor was not entitled to sue for enhanced rent, and that the stipulation for the higher rate was a mere threat, and not intended to be carried out. The first Court gave a decree at an enhanced rate, or an addition of 2 annas in the rupee in terms of s. 29 (*b*) of the Bengal Tenancy Act. On appeal, the Subordinate Judge dismissed the whole suit, on the ground that the suit being one for enhanced rent, and the plaintiff a part properietor, the suit did not lie.

Held, that the *kabuliat* having been executed before the Bengal Tenancy Act was passed, the present case did not come within the operation of that Act, and the plaintiff although a part proprietor, could bring this suit. *Ram Chunder Chackrabutty* v. *Giridhur Dutt* (1) followed.

Held by PRINSEP and GHOSE, JJ. (RAMPINI, J., dissenting), that the additional rent was intended to be enforceable only on default to execute a fresh *kabuliat*, and the so-called agreement to pay at the enhanced rate of Rs. 4 was in the nature of a penalty.

Held by RAMPINI, J.—The plea that the rate of Rs. 4 was a penalty was not taken by the defendant in his written statement, and, in any case, the stipulation did not come within the purview of s. 74 of the Indian Contract Act. Moreover the suit is not for compensation for breach of contract, but for rent at a rate which the defendant has agreed to pay from a certain time. *Held*, also, that s. 29 (*b*) of the Bengal Tenancy Act has no retrospective effect, and did not apply to the present *kabuliat*, which was executed before the passing of

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* Appeal from Appellate Decree No. 2339 of 1893 against the decree of Babu Hure Gobind Mookerjee, Subordinate Judge of Bhagalpore, dated the 31st of August 1893, affirming the decree of Babu Uma Churn Kur, Munsif of Modhepura, dated the 4th of March 1893.

(1) 19 C. 755.

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that Act. Section 5 of Bengal Act VIII of 1869, which would be the law applicable, did not debar an agreement by an occupancy ryot to pay whatever rate he pleased.

[Diss., 20 P. L. R. 1907 ; F., 17 C.L.J. 590 (592) = 20 Ind. Cas. 516 18 C. L. J. 95 (97) = 21 Ind Cas. 443 (444) ; 7 C.W. N. 94 (96) ; R , 16 C. L. J. 422 (424) = 17 C. W. N. 430 = 16 Ind. Cas. 929 ; 3 C. W. N. 225 (226). D., 25 C. 917 (925) ; 28 C. 166 (168) ; 18 C. L. J. 74 (75) = 21 Ind Cas. 351.]

THE plaintiff, as shareholder of 7 annas of *mouza* Boruari, brought this suit in respect of his share of arrears of rent for the years 1296 to 1299 Fusli (1889 to 1891), under the terms of a *kabuliat* executed by the defendant on 19th Asin Fusli (27th September 1881). The plaint alleged that the rent of the *mouza* was collected jointly by all the proprietors, including the plaintiff, up to the year 1295 Fusli, and that from the year 1296, after settlement of a dispute between them as regards their shares, they had peen realizing the rent from the tenants separately according to their respective shares.

[660] The terms of the *kabuliat*, dated 19th Asin 1289, were as follow :—

"I have, of my own free will and accord, taken for the purposes of cultivation, from Munshi Kamla Pershad, son of Munshi Pyari Lal, deceased an inhabitant and part proprietor of *mouza* Nagwara, Pergana Tirsath, District Tirhut, the manager of Raj Boruari, Pergana Mulhani Gopal, Sub-District Sopoul, and of the zemindar of the said *mouza* Boruari, 42 bighas 15 cottas of paddy and homestead lands, lying within the boundaries given below, in the said *mouza*, at an annual *jama* of Rs. 10 annas 9, exclusive of the road and public works cesses, and for a term of seven years, from 1289 to 1295, agreeing to pay at the undermentioned rates for the paddy and homestead lands. I accordingly execute and deliver this *kabuliat* respecting the same, to the effect that I shall cultivate the said lands, and appropriate their produce; that I, the tenant, shall have to bear the consequences of inundation of the lands remaining waste, of the want of proper cultivation, and of the heavenly calamities ; that I shall, on taking receipts, pay in the *zemindary cutcheri*, year after year, and instalment after instalment, the rent at the *jama* defined above ; that, should I fail to pay any of the instalments, I shall, in addition to the *jama*, pay interest for non-payment of the instalments at 2 annas a rupee for every instalment ; that, in case of non-payment of all the instalments, the proprietors hereinbefore alluded to shall have power to oust me of the lands, without having recourse to a law suit ; that upon expiration of the term fixed in this *kabuliat*, I shall execute a fresh *kabuliat* in favour of the proprietors, and then cultivate the said lands ; that, should I cultivate the lands without executing a fresh *kabuliat*, I shall, without any objection, pay rent for them at one and the same rate of Rs. 4 a bigha ; and that I and my heirs have and shall have, in that case, no objection whatever to pay rent at one and the same rate. I have, therefore, executed this *kabuliat* for a term of seven years in respect of lands other than *kamat*, so that it may be of use when necessary."

The defendant in his written statement objected to the rate of Rs. 4 on the grounds among others :—

"(5) That the plaintiff is only a shareholder of *mouza* Boruari, and he has consequently no right to enhance the rent of any tenant, The suit is therefore liable to be dismissed.

"(7) That the defendant, has now come to know upon enquiry, that in the *kabuliats* executed by tenants of Raj Boruari, there is a stipulation to

the effect that, if upon expiration of the term thereof fresh *kabuliats* be not executed, the rent should be realized at the rate of Rs. 4 a bigha. This leads the defendant to believe that this condition was laid down as a mere threat to the tenants. The defendant has also come to know that rent is being realized at the old rates from those tenants also, the terms of whose *kabuliats* have expired. The condition as to enhancement of rent was put down in **[661]** the *kabuliats* simply as a matter of form. The said condition was not intended to be enforced.

"(9) That the defendant has paid the plaintiff in full the rent for the years in suit at the rates alleged by him; and for this reason also the present suit cannot proceed."

The Court of first instance found that the plaintiff's collection of rents was separate, and held that the present suit was maintainable; but that the defendant being an occupancy ryot, under the law, his rent could not be enhanced by more than 2 annas in the rupee by virtue of an agreement in writing.

On appeal the Subordinate Judge observed:—

"Under s. 28 of the Bengal Tenancy Act, the rent of an occupancy *ryot* cannot be enhanced, except under the provisions of that Act, and under s. 29 the rent of such a *ryot* may be *enhanced* by contract. In each of the present cases, higher rent for the same land has been claimed than what was formerly payable for the same. The suits, therefore, are suits for enhanced rents, and as they were brought only by one of the two joint landlords, the claims for enhanced rents cannot succeed."

The plaintiff appealed to the High Court.

Babu *Umakali Mukerjee* and Babu *Joges Chandra Dey*, for the appellant.

Babu *Sarada Charan Mitra*, for the respondent.

Babu *Umakali Mukerjee*.—This is not a suit for enhancement of rent. It is a suit for rent at a rate agreed upon by the defendant. There can be no objection to this suit on the ground that the plaintiff is only a fractional shareholder. Section 188 of the Bengal Tenancy Act does not apply. *Premchand Nuskur* v. *Mokshoda Debi* (1), *Jugobundhu Pattuck* v. *Jadu Ghose Alkuski* (2). Section 178 of the Act does not affect this case, and ss. 27, 28 and 29, would not touch it, as it is not a suit for enhancement. The case of *Ram Chunder Chackrabutty* v. *Giridhur Dutt* (3) is on all fours with the present. The plaintiff is entitled, under the provision of the contract entered into with the defendant, to a decree for rent at the rate of Rs. 4. [GHOSE, J.—The question seems to be whether that provision is not in the nature of a penalty.] The parties intended a re-adjustment after seven years; if there was none, the parties agreed upon the rate of Rs. 4. The **[662]** agreement provides for the *future* rate and on the principle of the Full Bench ruling in *Kalachand Kyal* v. *Shib Chunder Roy* (4), the rate of Rs. 4 is not a penalty. The question of penalty was not raised by the defendant in the Courts below, and he cannot raise it now.

Babu *Sarada Charan Mitra*, for the respondent.—The question of penalty was raised by the defendant in paragraph 7 of his written statement, where he said that the condition was a threat. The only contingency contemplated in the provision in question was non-execution of a new *kabuliat*; the provision then would be a penalty. The law (s. 24 of the Bengal Tenancy Act) provides for fair and equitable rates, and that

(1) 14 C. 201. (2) 15 C. 47. (3) 19 C. 755. (4) 19 C. 392,

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was also the old law. That is the true test to examine whether the condition is penal or not. The suit should be dealt with as one for compensation. Section 74 of the Contract Act allows only a reasonable compensation; in the absence of any evidence to the contrary, the original rent should be held to be such compensation.

Babu *Umakali Mukerjee* was heard in reply.

The following judgments were delivered by the Court (PRINSEP, GHOSE and RAMPINI, JJ.):—

JUDGMENTS.

PRINSEP, J.—This is a suit for rent due to the plaintiff as part proprietor of an estate.

The defendant Bakai Singh held 42 bighas 15 cottas of land at a rent of Rs. 10 for seven years, which expired in Asin 1296 (F.), and in a *kabuliat* executed by him, he agreed that, "on expiration of the term fixed, I shall execute a fresh *kabuliat* in favour of the proprietors, and then cultivate the said lands," and further that, "should I cultivate the lands without executing a fresh *kabuliat*, I shall, without any objection, pay rent to them at one and the same rate of Rs. 4 per bigha."

The defendant did not execute a fresh *kabuliat*, and accordingly the plaintiff has brought this suit, claiming rent at Rs. 171 instead of at Rs. 10 as formerly.

It has been found that the tenant defendant had acquired rights of occupancy under the Rent Act then in force before the execution of that *kabuliat*.

[663] The Munsif was evidently of opinion that the agreement to pay at the rate of Rs. 4 per bigha in the event of a breach of the condition as to the execution of a fresh *kabuliat*, at the end of seven years, was in the nature of a penalty, and he held that the plaintiff was entitled to enhanced rent, only at an increase of 2 annas per rupee on the former rent as a "compensation," and he gave plaintiff a decree for the amount so due. As we understand him, in coming to this conclusion, he applied s. 29 of the Bengal Tenancy Act, and the principles of s. 74 of the Contract Act. In appeal the Subordinate Judge dismissed the suit, holding that, as the plaintiff is only a part proprietor of the estate, he cannot sue for an enhancement of rent, such enhancement can be made only under the Bengal Tenancy Act, and cannot be made, except by all the proprietors conjointly.

The *kabuliat* was executed before the Bengal Tenancy Act was passed, and, therefore, any contract then made would not come within the operation of that Act. For a similar reason, the Subordinate Judge has misapplied that Act, so as to bar this suit brought by the plaintiff, a part proprietor of the estate. The suit is not under the Bengal Tenancy Act, and the defendant has admitted in his evidence that he has been paying the co-sharers of the estate the rents due to them separately, and, therefore, as already held by this Court, the suit is permissible.

The question then arises whether the plaintiff is entitled to rent at the rate claimed by reason of the terms of the *kabuliat*.

It has been contended before us for the plaintiff appellant that the enhanced rate of rent which was to be paid on default of executing a fresh *kabuliat* was what was in the contemplation of the parties should be the new rent, and that the fresh *kabuliat* which the defendant undertook to execute, was to be in those terms.

On the other hand, it is contended that no such agreement was made, and that this was in the nature of a penalty for not executing a fresh *kabuliat*. 1895 MARCH 6.

The plaint certainly does not state any such agreement. APPELLATE CIVIL.

It is in the following terms: "It was stipulated in the said *kabuliat*, that, upon expiration of the terms thereof, he would execute a fresh *kabuliat*, and then cultivate land, and that, should he cultivate the lands without executing a fresh *kabuliat*, he [664] would pay for all the land, at one and the same rate, that is, Rs. 4 a bigha. The defendant, however, notwithstanding that this term of the *kabuliats* has expired, has neither executed a fresh *kabuliat* nor given up the lands. The plaintiff is, therefore, entitled, under the terms of the *kabuliat*, to recover the rent for the said lands at one and the same rate of Rs. 4 a bigha from the year 1296 Fusli." 22 C. 658.

There is no evidence to support the case now set up that any such agreement was made, nor is there anything to show on what ground this rate of Rs. 4 a bigha is claimed, except on default of the defendant in excuting a fresh *kabuliat*.

The plaintiff's case, as brought, was that he was entitled to this increase of rent, because the defendant did not execute a fresh *kabuliat*. Moreover, it has not been stated, except in the course of argument before us, what the terms of the fresh *kabuliat* in respect of the rent to be payable were to be, and it has been now stated that the rent was to be at Rs. 4 a bigha. By this we are asked to understand that whether the defendant did or did not execute a fresh *kabuliat* was of no consequence, for if he retained the lands, he was to pay enhanced rent, raising his rent from Rs. 10 to Rs. 171, and this, although, before he executed that *kabuliat*, he had a right of occupancy entitling him to hold the lands at rates which, under the law, could be raised only on the existence of certain specified circumstances. It seems unnecessary to remark that it is hardly possible that any one having a right of occupancy, like the defendant, would willingly so surrender his rights under the law.

The agreement was to execute a fresh *kabuliat* on expiry of the existing lease, but there is nothing to show either the amount of rent to be payable under such *kabuliat*, or the term of the new lease. And the defendant has stated in his written statement that he believed that the condition as to the payment of Rs. 4 a bigha on default of executing a *kabuliat* "was laid down as a mere threat to the tenants," and that, it was "put down in the *kabuliats* simply as a matter of form, &c. The said condition was not intended to be enforced."

We are unable to hold that the defendant agreed to pay rent at Rs. 4 a bigha at the expiry of his lease, or that he agreed to execute a fresh *kabuliat* on these terms. The additional rent was [665] intended to be enforceable, only on default to execute a fresh *kabuliat*, and this was the plaintiff's case as brought and tried. We rather hold, as the Munsif seems to have held, that the so-called agreement to pay at the enhanced rate of Rs. 4 a bigha, was in the nature of a penalty.

It must next be considered whether, if this be regarded as a penalty, plaintiff is entitled to a remand in order that it may be determined whether, having regard to s. 74 of the Contract Act, he is entitled to any, and, if so, to what compensation for the breach of the contract in not executing a fresh *kabuliat*. Any compensation so awardable must be reasonable under the law, and is not necessarily what may be stated in the

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contract. The amount so stated should be regarded only as the full amount which can be claimed. In this case the compensation is an enhancement of rent on a tenant with rights of occupancy and holding at rates of 8 annas, 4 annas and 2 annas per bigha to an uniform rate of Rs. 4. That is *prima facie* altogether unreasonable, but that is what the plaintiff claims, and there is no evidence to show how that rate was fixed, or, indeed, what would be a reasonable compensation by way of an enhancement of rent.

The only conclusion at which I can arrive is, therefore, that the plaintiff has failed to show that he is entitled to anything more than the former rate of rent. The plaintiff is entitled to a decree for the arrears admittedly due at the former rates with interest, and to nothing further. To that extent the decree of the lower appellate Court is modified. Each party will bear his own costs throughout.

I would add, in conclusion, that a case heard by my learned colleagues has been referred to by Rampini, J., in which judgment has not yet been delivered. I am not aware of the facts of that case, so that I am unable to consider it in connection with this case.

GHOSE, J.—I agree. I desire to add, with reference to the case referred to by Mr. Justice Rampini in his judgment, that the facts of the case and the terms of the agreement are very different from the facts and conditions of the *kabuliat* in this case.

RAMPINI, J.—The plaintiff in this suit sues for arrears of rent of the years 1296 to 1299, on the basis of a registered *kabuliat* executed by the defendant on the 27th September 1881. The **[666]** terms of the *kabuliat*, with regard to the execution of which no question has been raised before us, are that the defendant shall pay rent at various rates, 2 annas, 4 annas and 8 annas, for the land held by him for a term of seven years; that if, on the expiry of that term, he shall continue to cultivate the land, he shall execute a fresh *kabuliat*; and that if he fails to do so, he shall pay rent for land held by him at the rate of Rs. 4 per bigha. Now, the plaintiff alleges, and it is not denied, that the defendant continues to hold the land and has executed no fresh *kabuliat*. He accordingly sues for arrears of rent at the rate of Rs. 4 per bigha. The Munsif held that the rate of the defendant's rent could not be increased by more than 2 annas in the rupee. He accordingly gave the plaintiff a decree at that rate. The Subordinate Judge, however, held that as the plaintiff was but one of the two joint landlords, he could not get any enhanced rent at all.

The plaintiff now urges (1) that the lower Courts are mistaken in supposing that he is suing for the enhancement of the defendant's rent. He does not seek in the suit to enhance the defendant's rent, but merely for arrears of rent at a rate agreed upon by the defendant in 1881, long before the Tenancy Act came into operation, and which arrears there is nothing in the Tenancy Act to prevent his recovering; (2) that, although he and his co-sharers formerly collected their rents jointly, they have collected them separately from 1296; that the defendant has, in his written statement, raised no objection to this, and has not resisted his claim on this ground. On the contrary, in para. 7 of his written statement, he pleads payment to him of his share of the rent, and in his deposition he has deposed to having paid his co-sharer's share of the rent to them separately. In my opinion both these contentions are sound and should prevail. I think the reason the lower appellate Court has given for dismissing the suit is manifestly wrong. The present case is, I consider, similar to

the case of *Ram Chunder Chackrabutty* v. *Giridhur Dutt* (1), in which the ryot had been previously holding 11½ bighas of land, rent free, and was held liable for rent for this land at the rate of Rs. 1-8 per bigha, which, in circumstances similar to those [667] of the present case, he had agreed to pay from the date of the expiry of his previous lease.

But it has been said that, even if this be so, the rate of Rs. 4 per bigha, which the defendant in his *kabuliat* agreed to pay if he did not execute a fresh *kabuliat* after the expiry of the seven years mentioned in the *kabuliat*, is a penalty, and, therefore, cannot be enforced against him. But he took no such plea in his written statement, and in any case, I am of opinion that the stipulation to pay Rs. 4 per bigha is not one coming within the purview of s. 74 of the Contract Act, which is the only section, as far as I am aware of, that incorporates in the Statute law of this country the rule of English law against penalties, which, I may observe, has been described in a recent Full Bench judgment of the Allahabad High Court as an "irrational doctrine bequeathed to people, in England by a school of English judges, eminent, no doubt, in the law, but overprone to making agreements for parties which the parties had not made and did not intend to make for themselves." *Banke Behari* v. *Sundar Lal* (2). This suit is not brought on the allegation that a contract has been broken. The suit is for arrears of rent at a rate at which the defendant agreed to pay on his failure to execute a fresh *kabuliat*, which he has failed to execute. The rate of rent mentioned in the *kabuliat* is not named as "the amount to be paid in cases of a breach of the contract, and the amount which the plaintiff seeks to recover in this suit is not compensation for a breach of any contract," but rent for land held by the defendant at a rate which the defendant has agreed to pay from a certain time. For these reasons the provisions of s. 74 of the Contract Act, in my opinion, do not apply, nor is this rate a penalty according to the rule laid down in the Full Bench cases of *Kalachand Kyal* v. *Shib Chunder Roy* (3) and *Umarkhan Mahamadkhan* v. *Salekhan* (4). The rate runs from the expiry of the seven years' term for which the *kabuliat* was executed, and not from the date of the execution of the *kabuliat*.

I am further unable to see that the *kabuliat*, at the time it [668] was executed, contravened the provisions of any law then prevailing. It is, no doubt, an illegal contract now according to s. 29, cl. (*b*), of the Bengal Tenancy Act, and if it had been made since the passing of that Act, it could not be enforced, but that section has no retrospective effect. Section 5 of Bengal Act VIII of 1869 lays down that ryots having rights of occupancy (and the defendant is, of course, a ryot with a right of occupancy) are entitled to receive *pottahs* at fair and equitable rates. But this provision has never, as far as I am aware, been interpreted as meaning that a ryot with a right of occupancy may not agree to pay whatever rate he pleases.

Nor can it, I think, be said that the rate of Rs. 4 per bigha, which the defendant has agreed to pay, is an unconscionable rate, which a Court of Equity would be justified in setting aside, inasmuch as in another case, in which, in similar circumstances, a non-occupancy ryot has agreed to pay Rs. 5 per bigha, the judgment in which case will be presently delivered, my learned brother Ghose and I concur in holding that he is bound to pay that rate. The fact that the defendant in that case is a non-occupancy

(1) 19 C. 755. (2) 15 A. 232 (253). (3) 19 C. 392. (4) 17 B. 106.

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ryot, does not in my opinion affect the question whether the rate stipulated for is a penalty or not. For if it be a penalty and void for that reason, it must be so, whatever be the status of the ryot. If it be not a penalty, it is not one whether the tenant be an occupancy or a non-occupancy ryot.

The respondent's pleader has also alluded to the provisions of s. 45 of the Contract Act, and has raised the plea that the defendant is not bound to fulfil to one of two joint promisees a promise made to both jointly. This contention is, in my opinion, met by the fact that a fresh contract was made by the parties in 1296, as is clear from the defendant's written statement and his deposition.

I am, therefore, of opinion that this second appeal should be decreed with costs.

S. C. C. *Decree varied.*

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22 C. 669.

[669] CRIMINAL REVISION.

Before Sir W. Comer Petheram Kt., Chief Justice, and Mr. Justice Beverley.

PROSONNO KUMAR PATRA (*Petitioner*) *v.* UDOY SANT (*Opposite-party*).*
[30th April, 1895.]

Theft—Penal Code (Act XLV of 1860), *s.* 379*—Removal of debtor's property by the creditor—Penal Code as drafted in* 1837, *s.* 363.

With a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the accused, three head of cattle worth Rs. 60 were removed from the complainant's homestead under the order of the accused: *Held*, the offence of theft was not committed by the accused.

The illustrations to s. 378 of the Penal Code indicate that it was the intention of the Legislature that, in order to have committed theft within the meaning of the section, the taker must have taken the thing with the intention of keeping it himself, or disposing of it for his own benefit, or in some way which would compel the owner to pay him money which he did not owe him in order to regain his property.

The words "intending to take dishonestly any moveable property" in the above section, read with s. 23 and s. 24 of the Penal Code, mean "with the intention of gaining by unlawful means property to which he is not legally entitled." "To gain property by unlawful means" means "to gain the thing moved for the use of the gainer," and not "the gaining possession of it for a time for a temporary purpose."

Section 363 of the Penal Code as drafted in 1837 discussed.

[**Overruled**, 22 C. 1017 (F.B); **Diss.**, 18 A. 88; 13 C.P.L.R. 165 (166); Rat. Unr. Cr. Cas. 908 (913); **Rel.**, 8 A.L.J. 1237 = 12 Cr. L.J. 580 = 12 Ind. Cas. 844; **R.**, U.B.R. (1897—1901) 339 (Cr).]

WITH a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the accused as rent, three head of cattle worth Rs. 60 were, under the order of the accused, removed from the complainant's homestead. On the 19th of January 1895 the accused was convicted of theft under s. 380 of the Penal Code, and sentenced to six months' rigorous imprisonment by the Deputy Magistrate of Midnapore. On appeal the Sessions Judge upheld the conviction, but reduced the sentence to rigorous imprisonment for one day and a fine of Rs. 50. On the 21st of March 1895 the accused obtained a rule from the High Court to show

* Criminal Revision No. 74 of 1895, against the order passed by J. Pratt, Esq., Sessions Judge of Midnapore, dated the 28th of January 1895, modifying the order of A. C. Mackertich, Esq., Deputy Magistrate of Midnapore, dated the 19th of January 1895.

[670] cause why the conviction should not be set aside, on the ground that no offence under s. 380 of the Penal Code had been committed. 1895 APRIL 30.

Mr. *M. Ghose*, Mr. *Barrow* and Babu *Ashutosh Mukerjee*, appeared on behalf of the petitioner in support of the rule. CRIMINAL REVISION.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown, with Babu *Murali Lali Mozumdar* and Babu *Sarat Chandra Roy Chowdhry*, for the prosecutor appeared to show cause. 22 C. 669.

Mr. *M. Ghose.*—It is found that the complainant owed the accused Rs. 14, and that, in order to put pressure upon the complainant to pay that sum, the cattle were removed and detained. That is not theft under the Penal Code. In England it would clearly not amount to stealing: *Reg.* v. *Wade* (1). The Indian cases do not go so far as to lay down that a creditor may be guilty of theft by removing the goods of the debtor to compel the latter to pay up his just debt.

The *Deputy Legal Remembrancer* showing cause.—The English law is different. The Penal Code expressly does away with the necessity of what is known as the *animus furandi*. *Queen* v. *Madaree Chowkeedar* (2), decided by three Judges of this Court, has long settled the question: see also *Queen* v. *Preonath Banerjee* (3).

Mr. *M. Ghose* in reply.—The case of *Madaree Chowkeedar* (2) has been misunderstood. There it is assumed that the taking was dishonest. Besides, the prisoner was not himself a creditor, and he had therefore no right to remove the cows. In *Preonath Banerjee's* case (3), it does not clearly appear from the report that the act was done to compel the payment of a just debt and not to extort more than was due. The strongest case in favour of Mr. Kilby's contention is that of *Queen-Empress* v. *Gangaram Santaram* (4). But in that case I submit the principle laid down in *Cape* v. *Scott* (5) has been misapplied. See Mr. Starling's notes on that case in his Indian Criminal Law, 5th edition, p. 441. The Legislature [671] could never have intended that if a hotel-keeper were to remove the boxes from the top of the carriage of a lodger who was about to leave without paying his bill, he should be found guilty of theft. [PETHERAM, C.J.—A hotel-keeper may have a lien over the luggage of his lodger.] Whether that is so in this country or not, let us take the case of a boarding-house keeper, or the case of any ordinary creditor. In the case of *Queen* v. *Soshye Bhosun Roy* (6) it was held to be no theft to remove a *khatta* book of the complainant for the purpose of producing it in evidence against him. The learned Judges (Kemp and Glover, JJ.) in that case were the same as in *Madaree Chowkeedar's* case (2). It is not wrongful gain or wrongful loss to remove and detain goods temporarily when it is done for the purpose of compelling payment of what is justly due. If the demand had been illegal the case might be different. The following cases were also cited: *Rex.* v. *Dickinson* (7), *Rex* v. *Crump* (8).

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

On the 19th January last the petitioner, Prosonno Kumar Patra, was convicted of an offence under s. 380 of the Penal Code, and was sentenced to six months' rigorous imprisonment. On appeal, the Sessions Judge of Midnapore upheld the conviction, but reduced the sentence to rigorous

(1) 11 Cox's C. C. 549. (2) 3 W.R. Cr. 2. (3) 5 W.R. Cr. 68.
(4) 9 B. 135. (5) L.R. 9 Q.B. 269. (6) 4 Shome's Rep. 14.
(7) R. & R. 420. (8) 1 C. & P. 658.

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imprisonment for one day and a fine of Rs. 50. On the 21st ultimo, the petitioner obtained a rule from this Court to show cause why the conviction should not be set aside, on the ground that no offence under s. 380 of the Penal Code had been committed.

The case for the prosecution was that, on the 13th December last, three head of cattle worth Rs. 60 were removed from the complainant's homestead under the immediate order of the petitioner, with a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the petitioner as rent. The defence was that the cattle were handed over to the petitioner's servants voluntarily in part-payment of a debt due by him, and that the petitioner himself was not present at the time and knew nothing of the [672] occurrence. This defence has been found false by the lower Courts, and the question before us is whether, upon the case for the prosecution, the offence of theft has been committed.

The history of the Indian legislation which deals with theft and other offences against property, is interesting and instructive. In the Penal Code, as drafted in 1837, the section which defined theft was s. 363 and was in these words: "Whoever, intending to take fraudulently anything which is property, and which is not attached to the earth, out of the possession of any person, without that person's consent, moves that thing in order to such taking, is said to commit theft." The section was followed by several explanations, the last of which was: "A person may commit theft, though he intends to restore the property after taking it" and by a number of illustrations, among which were the following :—

(o) *A* takes an article belonging to *Z* out of *Z's* possession, without *Z's* consent, with the intention of carrying it back to *Z* and of pretending to have found it, in the hope of thus obtaining a reward from *Z*. Here *A* takes fraudulently. *A* has therefore committed theft.

(q) *A* and *Z* are gardeners. *Z* has reared a pine-apple of extraordinary size in hope of obtaining a prize. *A* takes the pine-apple without *Z's* consent, produces it before the judges as his own, and obtains the prize. He then sends back the pine-apple to *Z*. Here, as *A* took the pine-apple fraudulently, *A* has committed theft, though he has restored the pine-apple.

(t) *A*, being on friendly terms with *Z*, goes to *Z's* library, in *Z's* absence, and takes away a book without *Z's* express consent. Here it is probable that *A* may have conceived that he had *Z's* implied consent to use *Z's* books. If this was *A's* impression, *A* has not committed theft.

(y) *A* believing in good faith that *Z* owes him a thousand rupees, and only intending to pay himself what is due to him, without injury to any party, takes property out of *Z's* possession without *Z's* consent. *A*, not acting fraudulently, is not guilty of theft. But he may have committed an offence under the provisions contained in the chapter entitled "Of the illegal pursuit of legal rights."

[673] (z) But if *A*, in the last illustration, intended to take and appropriate more than sufficient to repay himself, or intended, after repaying himself, to prosecute *Z* for the debt, here, as such an intention was fraudulent, *A* commits theft.

The offence of the illgal pursuit of legal rights, which was contemplated by the framers of the Draft Code, was defined by s. 460 of the Draft Code as follows: "Whoever in good faith, believing a debt to be legally due, takes, or attempts to take, any property from the person whom he believes to owe that debt, not fraudulently, but in order to satisfy that debt, under such circumstances that, if his intentions were

fraudulent, he would be guilty of theft or robbery, shall be punished with imprisonment of either description for a term which may extend to one year or fine or both."

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Added to the section were several illustrations, of which the first was (*a*): " *A*. believing in good faith, that *Z* owes him one hundred rupees, in order to satisfy the debt, takes property belonging to *Z*, not fraudulently, but under such circumstances that, if he took it fraudulently, he would be guilty of theft. *A* sells that property for one hundred and fifty rupees, and sends back fifty rupees to *Z*, *A* has committed the offence defined in this clause."

In the appendix to the Draft Code, the framers in note (*O*) say in speaking of this offence: " This act is distinguished from theft by one of the broadest lines of demarcation which can be found in the Code. It is not a fraudulent act. It is intended to correct a wrongful distribution of property, to do what the Courts of law, if recourse were had to them, would order to be done. Public feeling would be shocked if such a creditor were called by the ignominious name of a thief."

It does not appear that at this time the framers of the Code intended to make the taking possession of the property of a debtor by his creditor in order to pay a just debt any offence at all, inasmuch as such an act is excluded from the operation of s. 363 by illustration (*y*), and from that of s. 460 by the terms of the section itself and by those of illustration (*a*), both of which provide that the taking must be to satisfy the debt in order to be an offence within that section.

[674] On the 23rd of July 1846, the Indian Law Commissioners presented their first report on the Penal Code, and in paras. 486 and 487 deal with the offence of theft as defined in s. 363 of the Draft Code. In para. 486 they say: " The Code differs from the Digest in the explanation that a person may commit theft though he intends to restore the property after taking it, whereas by art. 30, s. 1, chap. XVIII of the Digest, it is declared that it is not theft where the intent is to deprive the owner of the temporary possession only, and not of his absolute property, in the thing taken. Thus the intent expressed in the definition given in the Digest is to despoil the owner and fraudulently appropriate the thing taken and removed, while the intent expressed in the definition in the Code is merely to take fraudulently, that is to say, to take with the purpose of causing wrongful gain to the party taking, or some other, by means of wrongful loss to the party from whom the thing is taken, or by depriving him of the benefit which he would have enjoyed if it had not been taken from him." In para. 487 the Commissioners go on to discuss illustration (*q*) to the section, and come to the conclusion that it is necessary and sufficient for the purpose for which it was framed, but they add that there is a difference of opinion between them as to whether the principle of the Digest, or that of the Draft Code, is the one on which the Legislature ought to act.

In the second report of the Commissioners, which was dated June 24th, 1847, they discuss, in paras. 308 to 317, the provisions in the Draft Code, which create the offence which is described as the illegal pursuit of legal rights, and intimate that they approve of them.

The Indian Penal Code became law in 1860. In that Code, s. 378 takes the place of s. 363 in the Draft Code, and the only practical difference between the two sections themselves is that the word " dishonestly " is substituted for the word " fraudulently ; " but the definitions in ss. 23

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and 24 of the Penal Code attach precisely the same meaning to the word "dishonestly" as was attached to the word "fraudulently" by ss. 15 and 16 of the Draft Code. Several of the explanations attached to the section in the Draft Code are changed and the one which we have [675] quoted above is entirely omitted, as are also illustrations (*q*), (*y*) and (*z*). The whole of the provisions which related to the illegal pursuit of legal rights have disappeared; but to s. 403, which deals with the offence of criminal misappropriation of property, the following explanation is appended: "A dishonest misappropriation, for a time only, is a misappropriation within the meaning of this section," and several illustrations are given, among which is (*b*):" *A* being on friendly terms with *Z*, goes to *Z's* library, in *Z's* absence and takes away a book without *Z's* express consent. Here, if *A* was under the impression that he had *Z's* implied consent to take the book for the purpose of reading it, *A* has not committed theft. But if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section."

As we have before noticed, the section itself is practically the same now as it was when it stood in the Draft Code, as although one word bas been substituted for another, the two words have the same meaning attached to them by the definitions, and the question we have to consider is whether it is clear from the words used by the Legislature that it was their intention that the offence of theft should be committed when property is taken out of the possession of the owner, without his consent, with the intention of returning it to him and without the intention of gaining anything by the temporary detention, except something to which the taker is legally entitled, notwithstanding the fact that the explanation and illustration, which had been inserted in the Draft Code for the express purpose of making it theft to deprive a person temporarily of the use and enjoyment of his property, were deliberately omitted when it was passed into law.

The only one of the illustrations to the present section, which throws, we think, any light on this question, is (*l*): " *A* takes an article belonging to *Z* out of *Z's* possession, without *Z's* consent, with the intention of keeping it until he obtains money from *Z* as a reward for its restoration. Here *A* takes dishonestly. *A* has therefore committed theft."

A consideration of this illustration shows that the person who is represented as taking the thing, takes it with the intention of appropriating it to his own use, and not merely of using it for a [676] temporary purpose, in the same sense that a person who buys an article for the purpose of selling it again immediately, buys it in order to appropriate it to his own use, though he only intends to keep it for a very short time. In the case in the illustration, the taker takes the thing with the intention of keeping it until he can exchange it for money, or something else, to which he is not entitled, and this appears to us to be stealing the thing taken in the most ordinary sense of the word. So that, as far as the illustrations to the existing sections help us, they indicate that it was the intention of the Legislature that in order to have committed theft, within the meaning of the section, the taker must have taken the thing with the intention of keeping it himself, or disposing of it for his own benefit, or in some way which would compel the owner to pay him money which he did not owe him, in order to regain his property.

The words in the present section "whoever, intending to take dishonestly any moveable property out of the possession of another, moves that property, etc." must be read with the definitions in ss. 23 and 24

and the section will then read, "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, etc." and the question comes to be, whether to gain property by unlawful means, means to gain the thing moved for the use of the gainer, or whether it means the gaining possession of it for a time for a temporary purpose. We think that the first is the more natural meaning of the words, and that, even without the history of this section, that is the meaning which we should put upon them; but when we know that it is that which the framers intended them to bear, and that the Legislature refused to sanction the explanation and illustration which would have given them a wider meaning, we think the matter becomes abundantly clear.

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We now proceed to examine the decisions of the various Courts in India on the subject. They are:—

1. *Queen* v. *Madaree Chowkeedar* (1), decided by Peacock, C.J., with Kemp and Glover, JJ., on the 17th of February 1865. The learned Judges held that the prisoner who had taken the goods of a **[677]** debtor and divided them amongst his creditors, forcibly and against his will, was guilty of theft.

2. *Queen* v. *Preonath Banerjee* (2), decided by L.S. Jackson, J., on the 16th of April 1866. The learned Judge held that the forcible and illegal seizure by a creditor of his debtor's bullock in order to satisfy his claim was theft.

3. *Jowahir Shah* v. *Gridharee Chowdhry* (3), decided by E. Jackson and Hobhouse, JJ., on the 9th of September 1868. The learned Judges held that where the accused prevented the complainants from proceeding in a certain direction with their carts, and exacted a sum of money from them, a toll which they had no right to claim, they were guilty of wrongful restraint, but not of theft.

4. *Queen* v. *Tarinee Prosad Banerjee* (4), decided by Kemp and Glover, JJ., on the 4th of June 1872. The learned Judges held that the carrying off of certain buffaloes belonging to the complainant by order of the accused, and the detention of them in the custody of his servant, amounted to an abetment of theft as defined in the Penal Code. The facts of this case do not appear at all clearly from the report, but as the learned Judges say it was very similar to that of *Queen* v. *Madaree* (*supra*) we assume that there was evidence that the accused intended to deprive the complainant entirely of his buffaloes, or to detain them until he got something to which he was not entitled in exchange for them.

5. *Aradhun Mundul* v. *Myan Khan Tackadgeer* (5), decided by Glover and Mitter, JJ., on the 4th of June 1875. The learned Judges held that the illegal seizure and impounding of cattle is not theft within the meaning of the Penal Code, even if effected with the malicious intent of subjecting the owners to additional expense, inconvenience and annoyance. In this case, it does not appear that the accused intended themselves to make any profit from their own illegal act.

6. *Queen* v. *Shoshee Bhushun Roy* (6), decided by Kemp and Glover, JJ., in 1876. The learned Judges held that where a person improperly obtained possession of a *khatta* book, and retained it with **[678]** the intention of using it in a judicial enquiry as evidence against the person to whom

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(1) 3 W. R. Cr. 2. (2) 5 W. R. Cr. 68. (3) 10 W.R. Cr. 35.
(4) 18 W.R. Cr. 8. (5) 24 W.R. Cr. 7. (6) 4 Shome's Rep. 14.

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it belonged, he had not committed theft, as such temporary retention could not cause wrongful loss to the owner within the meaning of the Code.

7. A Madras case, reported in Weir's Law of Offences and Criminal Procedure, p. 232 (3rd edition), decided on the 20th of February 1880, by the Chief Justice and Innes, J. The facts were that the accused, creditor of the prosecutor, drove away sundry head of cattle, during his absence, in order to put pressure upon him and get his debt paid. The learned Judges held that such taking caused wrongful loss to the prosecutor, was dishonest and therefore theft, and that it made no difference that the taking was intended to be only for a time.

8. *Queen-Empress* v. *Nagappa* (1), decided on the 27th of January 1890 by Birdwood and Jardine, JJ. The learned Judges held that the accused who had seized a boat which belonged to the complainant, while conveying passengers across a creek which flowed into a river at a point within three miles from a public ferry, his intention being to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and so to increase the income of the ferry, had committed theft, though it was not his intention to convert the boat to his own use, or to deprive the complainant permanently of its possession.

9. *Paryag Rai* v. *Arju Mian* (2), decided by the Chief Justice and Beverley, J., on the 18th of August 1894. The accused were found to have loosened the complainant's cattle at night and driven them to the pound, with the object of sharing with the pound-keeper the fees to be paid for their release. The learned Judges held that in that case the elements of theft were present, and directed that the accused should be tried for that offence.

This examination of the decisions shows that the learned Judges of the Madras High Court in 1880 thought that the section of the present Code had a more extended meaning than **[679]** that in the Code as originally drafted, even with the explanation which was omitted when the Code became law, and a more extended meaning than the section in the Draft Code which dealt with the illegal pursuit of legal rights, inasmuch as that section was limited to cases in which the property was illegally taken in satisfaction of a claim, and the Madras Court has held that it is theft for a creditor to deprive his debtor of the temporary possession of some article of his property, in order to put pressure on him to force him to pay a just debt. It also shows that in 1890 the learned Judges of the Bombay High Court thought that the present section has the same meaning as that given to the section in the Draft Code by the explanation which was omitted when the Code became law, as they held that it was theft to deprive a person of the possession of his property for a limited time, although there was no intention on the part of the accused to appropriate the property to his own use in any way. The earlier decisions in this Court are not fully reported, and it is difficult in some cases to ascertain from the reports what the precise facts of the cases were, but from the most careful examination of those cases which we can give them, we do not think that the learned Judges of this Court have ever intended to give the section of the present Code a wider meaning than that given it by illustration (*l*) which we have quoted above, the effect of which is that it is theft if a person takes the property of another for the purpose of extorting from the owner, in exchange for the thing taken, something which the taker has no right to claim. We are of opinion

(1) 15 B. 344. (2) 22 C. 139.

that the Courts of Madras and Bombay have given to the section a more extended meaning than it was intended by the Legislature to bear, and that the history of the law shows that what we understand to have been the reading of the section by the Judges of this Court has been the correct one. For these reasons we think that upon the case for the prosecution the offence of theft has not been committed, and the rule will be made absolute to set aside the conviction. The fine, if it has been paid, will be refunded.

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S. C. B. *Rule made absolute. Conviction set aside.*

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22 C. 680.

[680] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

ASSANULLA KHAN BAHADUR (*Plaintiff*) *v.* TIRTHABASHINI AND OTHERS (*Defendants*).* [27th March, 1895.]

Chowkidari Tax—Village Chowkidars Act (Bengal Act VI of 1870)*—Suit for arrears of chowkidari tax payable by putnidar under putni settlement—Abwab—Rent—Bengal Tenancy Act (Act VIII of* 1885), *ss.* 3, (5), 74*—Regulation VIII of* 1793, *ss.* 54, 55*—Regulation V of* 1812, *s.* 3*—Act VIII of* 1869, *s.* 11*—Second Appeal—Civil Procedure Code (Act XIV of* 1882), *s.* 586.

In a suit for arrears of chowkidari tax, payable by the *putnidar* under the *putni* settlement, the defence was that it was an illegal cess, and could not be legally recovered.

Held, that as the payment of the chowkidari tax was one of the terms of the *putni* settlement itself, which was entered into between parties competent to contract, and was made for valuable consideration, and the *putni* Regulation declares that *putni taluks* "shall be deemed to be valid tenures in perpetuity according to the terms of the engagements under which they are held," and, moreover, as the amount which the *putnidar* agrees to pay as chowkidari tax, is paid quite as much on account of the occupation of the property as that which is expressly called the rent, and is part of the ground rent quite as much as the latter, it is not an *abwab*, and is, therefore, recoverable.

Surnomoyee Dabee v. *Koomar Purresh Narain Roy* (1) followed.

Tilukdhari Singh v. *Chulton Mahton* (2), and *Radha Prosad Singh* v. *Balkowar Koeri* (3) distinguished.

Pudmanund Singh v. *Baij Nath Singh* (4) referred to.

Held, also (upon the objection of the respondents, that the suit being one of the nature cognizable by a Small Cause Court, and valued at less than Rs. 500, no second appeal would lie under s. 586 of the Code of Civil Procedure) that as the consideration for the payment of the chowkidari tax is the occupation or the holding of the *patni* tenure, and as the payment is to [681] be made periodically to the zemindar by the *putnidar*, and the amount agreed to be paid is lawfully payable, it comes within the definition of rent in the Bengal Tenancy Act, and, therefore, a second appeal would lie.

Dheraj Mahtab Chand Bahadoor v. *Radha Binode Chowdhry* (5), *Erskine* v. *Trilochun Chatterjee* (6), *Watson & Co.* v. *Sreekristo Bhumick* (7) and *Rutnessur Biswas* v. *Hurish Chunder Bose* (8) referred to.

[F., 26 C. 611 (614); R., 3 C.L.J. 337 (338); 6 O. C. 299 (303).]

THIS appeal arose out of an action for recovery of chowkidari tax brought by the plaintiff against the defendant upon a registered contract. The plaintiff's allegation was that an eight-annas share of a certain zemindari was let out in *putni* lease to the defendant, and by the terms

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* Appeal from Appellate Decree, No. 198 of 1894, against the decree of Babu Brojo Behari Shome, Officiating Subordinate Judge of Tipperah, reversing the decree of Babu Nikunjo Behari Roy, Munsif of Moorshidabad, dated the 8th of September 1892.

(1) 4 C. 576. (2) 17 C. 131. (3) 17 C. 726. (4) 15 C. 828.
(5) 8 W. R. 517. (6) 9 W. R. 518. (7) 21 C. 132. (8) 11 C. 221.

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of the said lease he (the defendant) was bound to pay half of the salary of the village chowkidars, and that the amounts for the years 1294 to 1298 were paid by him (the plaintiff). The amount claimed was less than Rs. 500. The defence was that chowkidari tax was never paid by the defendant, that there was only one chowkidar in the *mouza*, and his pay was included in the rent, and that a portion of the claim, *i.e.*, with respect to 1294, was barred by limitation. The Court of first instance decreed the suit holding that under the registered lease the defendant was bound to pay the chowkidari tax. On appeal the Subordinate Judge dismissed the suit of the plaintiff, holding that the stipulation to pay the chowkidari tax payable by the zemindar was an agreement to pay an *abwab*, and consequently not recoverable under the law.

From this decision the plaintiff appealed to the High Court.

Babu *Sreenath Dass* and Babu *Bussunt Kumar Bose*, for the appellant.

Babu *Akshoy Coomar Banerjee*, for the respondents.

Babu *Akshoy Coomar Banerjee* took a preliminary objection, on the ground that the amount claimed being the amount paid by the appellant, which was payable by the defendant under a contract, as alleged by the plaintiff, the suit was one cognizable by a Small Cause Court, and being less than Rs. 500, no second appeal would lie. See *Dheraj Mahtab Chund Bahadoor* v. *Radha Binode Chowdhry* (1), *Erskine* v. *Trilochun Chatterjee* (2).

[682] Babu *Sreenath Dass.*—This is not a suit of the nature cognizable by a Small Cause Court. It is a suit for rent. Contracts of the nature under consideration are excepted from the cognizance of a Small Cause Court by cl. (10), sch. II of the Provincial Small Cause Courts Act (IX of 1887). See *Watson & Co.* v. *Sreekristo Bhumick* (3).

Chowkidari tax is not an *abwab*, and can be recovered legally. The case of *Radha Prosad Singh* v. *Balkowar Koeri* (4), relied upon by the lower appellate Court, does not apply. It is recoverable under Act VI of 1870, and it is with reference to this Act the zemindars enter into contracts with *putnidars* for payment of the chowkidari tax; therefore it is not illegal. For instance, *dak* tax and road-cess, though they are not rent, still are recoverable, not being *abwabs*. The question is whether chowkidari tax is legally recoverable, there being consideration for the contract. I submit it is. The Full Bench case of *Radha Prosad Singh* v. *Balkowar Koeri* (4) does not cover a case of this nature. Here the party originally enters into a contract, and makes himself liable to pay the tax; he is bound to pay it. It cannot be regarded as not legally recoverable, as it is recoverable under the Chowkidars Act (VI of 1870). Anything added to the original contract cannot be called an *abwab*, and this was included in the original settlement. The *putni* rent is the aggregate of all the rents fixed at the time of the settlement, as well as other impositions payable by the landlord in future on account of the demand of Government.

Babu *Akshoy Coomar Banerjee* in reply.—The plaintiff cannot recover the chowkidari tax, as it is an *abwab*. An *abwab* means anything over and above a definite sum which is agreed to be paid as rent. Anything indefinite is an *abwab*. In this case the amount is most uncertain. What is an *abwab* and what is rent is very difficult to distinguish. Anything that is paid in addition to the fixed rent is an *abwab*. See *Radha Prosad Singh* v. *Balkowar Koeri* (4) at p. 759 of the report. An *abwab* is something other than rent; this is certainly not rent. Plaintiff's case is,

(1) 8. W.R. 517. (2) 9 W.R. 518. (3) 21 C. 132. (4) 17 C. 726.

that because the amount, which was payable by the defendant, was paid by [683] him, the cause of action arose in each instalment as it fell due. The plaintiff does not claim it as rent. If it is held that the amount claimed is not an *abwab*, the case must go back for determination, whether a portion of the claim is barred by limitation or not.

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The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff appellant, who is the zemindar of *mouza* Panch Pukhuria, to recover from the defendants respondents, *putnidars* under him of an eight annas share of the *mouza*, a sum of money payable to him under the terms of the *putni* settlement on account of a moiety of the chowkidari tax of the *mouza* for certain years.

The defence was that a part of the claim, namely, that for the year 1294, was barred by limitation; that the amount claimed on account of the chowkidari tax is in excess of what is really payable annually, and has hitherto been paid to and received by the plaintiff; and that he is not entitled to claim any interest.

The first Court overruled the plea of limitation, holding that the claim was not one for rent, but was one based on a registered contract; and having found for the plaintiffs on the merits, it decreed the claim in full.

On appeal, the defendant for the first time raised the objection that the agreement to pay the chowkidari tax was void in law, as it was an agreement to pay an *abwab*; and the lower appellate Court has allowed the objection and dismissed the suit.

In second appeal it is contended for the plaintiff appellant, that the lower appellate Court is wrong in law in holding that the amount claimed in this case is in the nature of an *abwab*, while the defendants respondents take a preliminary objection that the second appeal is barred by s. 586 of the Code of Civil Procedure, the suit being of the Small Cause Court class and the amount claimed not exceeding Rs. 500.

It is necessary to consider the preliminary objection first.

In support of his objection the learned vakil for the respondents relies upon the cases of *Dheraj Mahtab Chund Bahadoor* v. [684] *Radha Binode Chowdhry* (1) and *Erskine* v. *Trilochun Chatterjee* (2). On the other hand, Babu Sreenath Dass, for the appellant, contends, on the authority of the case of *Watson & Co.* v. *Sreekristo Bhumick* (3), that the claim is one for rent, and is, therefore, excepted from the cognizance of a Small Cause Court by cl. 8 of the second schedule of the Mofussil Small Cause Courts Act (IX of 1887).

The two cases cited for the respondents do not appear to us to be exactly similar to the present, and upon the facts of this case we think the claim must be regarded as one for rent. In the first of the two cases cited above for the respondents, the facts are not set out in the report; and in the other case we learn from the judgment that it was "a suit by the zemindar against his *putnidars* founded upon the contract between the parties for the recovery of a sum of money which had been expended by the zemindar in the way of zemindari *dak* charges, which expenses, it was alleged, the *putnidar* was bound by his contract to bear." This would go to shew that the contract in that case was one by which the *putnidar* undertook

(1) 8 W.R. 517. (2) 9 W. R. 518. (3) 21 C. 132.

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to pay the *dak* charges, and that he not having done so, the zemindar had to undergo the expense and to sue for the money. If that was so, and if the contract was not to pay the amount to the zemindar in the first instance, the claim could not have been regarded as one for rent, and was rightly treated as one for compensation for the breach of contract. See *Rutnessur Biswas* v. *Hurish Chunder Bose* (1), and the suit was properly held to be one of the Small Cause Court class. In the present case the contract between the parties, which is to be found in the *putni kabuliat* itself, is that the *putnidars* shall pay to the zemindar the chowkidari tax, which the latter has to pay. The consideration for the payment is the occupation of the land or the holding of the *putni* tenure ; and the payment is to be made periodically to the zemindar by the *putnidar*. An amount so agreed to be paid comes, in our opinion, within the definition of rent in the Bengal Tenancy Act, provided it is lawfully payable, as was held in the case of *Watson & Co.* v. *Sreekristo Bhumick* (2). **[685]** That it is lawfully payable will be seen later on. The suit was not, therefore, one of the Small Cause Court class, and the preliminary objection must consequently be overruled.

Coming now to the contention of the appellant that the amount claimed in this suit is not of the nature of an *abwab*, we must hold that it is well founded, and that the Court of appeal below is wrong in dismissing the suit, on the ground of its being one for the recovery of an illegal cess.

The stipulation by the *putnidars* to pay to the zemindars the amount payable by him on account of the chowkidari tax of the *mouza* let out in *putni*, is one of the terms of the *putni* settlement itself ; it is entered into between parties competent to contract, and is made for valuable consideration ; and the *Putni* Reg. VIII of 1819, in s. 3, distinctly declares that *putni taluks* "shall be deemed to be valid tenures in perpetuity according to the terms of the engagements under which they are held." That being so, let us see how far the provisions of the law prohibiting the imposition of *abwab* and other cesses, affects this otherwise valid stipulation. At the time when the stipulation was entered into, that is, in 1881, the law relating to *abwabs* was to be found in ss. 54 and 55 of Reg. VIII of 1793, s. 3 of Reg. V of 1812, and s. 11 of Bengal Act VIII of 1869 ; and since the repeal of those enactments by the Bengal Tenancy Act, the same provisions have in substance been re-enacted in s. 74 of the last-mentioned Act.

Section 54 of Reg. VIII of 1793 recommended the consolidation of existing *abwabs* with the rent proper or *asul jama*, within a certain time, and s. 55 prohibited the imposition of any new *abwabs* on ryots. These provisions related to ryots only, and could not affect intermediate tenure-holders like *putnidars*. Section 3 of Reg. V of 1812, which was the provision applicable to the stipulation now under consideration, after authorising proprietors of land to grant leases to their dependent *talukdars*, under-farmers, and ryots in any form the contracting parties might think fit, prohibited the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathaut*, or any other denomination, and declared "all stipulations or reservations of that nature" **[686]** to be null and void. And s. 11 of Bengal Act VIII of 1869 made a landlord exacting any *abwab* liable in damages not exceeding double the amount exacted. Section 74 of the Bengal Tenancy

(1) 11 C. 221. (2) 21 C. 132.

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Act, which now in effect takes the place of these provisions, enacts that "all impositions upon tenants under the denominations of *abwab*, *mathaut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void."

It seems to us to be clear from these provisions of the law, that what they are intended to prohibit is the imposition upon tenants of *abwabs* and other cesses of a like nature in addition to the actual rent fixed by custom or contract. And the reason why the law prohibits these impositions, notwithstanding that they may be voluntarily agreed to, is (as may be gathered from the earlier provisions on the subject, that is, Reg. VIII of 1793, ss. 54, 55, and Reg. V of 1812, s. 3, that they are of an arbitrary and vaxatious character, and have an indirect and insidious effect in raising the rent to an oppressive extent. It is well known that in the case of an existing tenancy at a rent fixed by contract or by custom, if the landlord wishes to raise the rent, and the tenant objects, the parties very often come to an arrangement by which the tenant agrees to pay something which is apparently only occasional and temporary, in addition to the rent, being deluded by the notion that the rent, which is the permanent burden, remains unchanged, and the landlord agrees to accept the additional item, being encouraged by the hope that the increment once paid will be continued indefinitely. So also when a new tenancy is created, the landlord often finds it difficult to induce the tenant to accept a rate of rent higher than the customary rate, though he may be found willing to pay additional items as cesses. And it is matter of history, as we learn from the Revenue Records of the time of the Permanent Settlement, from which extracts are given in the judgment of Mr. Justice O'Kinealy in *Radha Prosad Singh* v. *Balkowar Koeri* (1), that these arbitrary and indefinite impositions were found to have grown to **[687]** such an oppressive extent as to call for the interference of the Legislature.

But neither the reasons nor the terms of these prohibitory rules, neither the spirit nor the letter of the law, can have any application to a case like the present, regard being had to the character of the tenancy and the nature of the so-called additional item of demand.

The tenancy here is a *putni* of a *mouza*, and from the very nature of the tenure and by the terms of the settlement, the tenant becomes entitled to all the future profits of the *mouza*, whether by enhancement of the rents of tenants, or by extension of cultivation by reclaiming waste lands, and the landlord practically turns himself into an annuitant upon his zemindari receiving a fixed sum from the *putnidar* as his annual income from the zemindari. This amount is called the fixed *jama* or rent in the *kabuliat* and it includes the Government revenue (which is itself a fixed sum) payable by the zemindar on account of his *mouza*. But besides the Government revenue, the zemindar has to pay other dues to the Government or to its officers, amongst which the chowkidari tax, the item in dispute, is one, and with a view to leave the zemindars clear profit from the *mouza* settled in *putni* unaffected by his liability to pay these dues, the arrangement is that the *putnidar* shall also pay to the zemindar the amount of this tax among others. And this amount is not consolidated with the fixed *jama* for this obviously harmless reason; that it is not itself fixed, being liable to variation, not by the will of the

(1) 17 C. 726 (740).

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zemindar, but under the provisions of the law by which it is imposed [Bengal Act VI of 1870.] There is nothing unfair or improper in this arrangement, nothing that contravenes the policy of the law in prohibiting the imposing of *abwabs*. The zemindar, who transfers to the *putnidar* all his rights to future increase of profits from the *mouza*, may justly require the *putnidar* to pay him money enough to enable him to pay all taxes or cesses imposed upon him on account of his owning the zemindari, and the *putnidar* naturally agrees to this. The amount he agrees to pay to the zemindar on account of the chowkidari tax is paid quite as much on account of the occupation of the land of the *mauza* by him as that which is expressly called the rent, and is part of the **[688]** ground rent quite as much as the latter. Though the one is kept separate from, it is no subsequent addition to, the other. They are both simultaneously fixed as parts of the return to be made by the tenant for holding the tenure, and the reason for their being kept separate, as stated above, is one that does not offend against the principle of the law upon which the prohibition of *abwabs* is based. A stipulation for the payment of such an amount cannot, we think, be regarded as one for the "imposition of an arbitrary or indefinite cess," within the meaning of s. 3 of Reg. V of 1812, or for an imposition "under the denomination of *abwab*, *mathaut*, or other like appellation in addition to the actual rent," within the meaning of s. 74 of the Bengal Tenancy Act, for this simple reason, that the imposition here depends primarily, not upon the will of the zemindar, but upon the law of the land [Bengal Act VI of 1870]. It is this Act which imposes the liability on the zemindar, and the zemindar merely stipulates with the *putnidar* when granting the *putni* that the latter should, among other sums, regularly pay him the amount levied from him under the Act. Of course, if the Act contained any prohibition against such stipulations as the English Property Tax Act (5 and 6 Vict., c. 35, s. 103) does, they would have been void. But in the absence of any such prohibition, there can be no reason for saying that the stipulation is illegal. See *Surnomoyee Dabee* v. *Kocmar Purresh Narain Roy* (1).

It was contended by the learned vakil for the respondents that the mere fact of the amount claimed on account of chowkidari tax not being consolidated with what is called the fixed *putni jama* or rent in the *kabuliat*, but being kept separate, was enough to render it an *abwab*, and therefore illegal and not recoverable; and in support of this broad proposition the cases of *Tilukdhari Singh* v. *Chultan Mahton* (2) and *Radha Prosad Singh* v. *Balkowar Koeri* (3) were relied upon. No doubt there are passages in some of the judgments delivered in these cases which, taken alone, might appear to lend support to the respondent's contention. But upon **[689]** a careful consideration of those cases, we think they are clearly distinguishable from the present, and do not touch the question now before us.

In the case of *Chultan Mahton* (4), the question referred to the Full Bench was whether certain items, which were admitted by the plaintiff himself to be *abwabs*, were legally recoverable by reason of their having been paid for a good many years, and both the Full Bench and the Privy Council, before which the case was taken up in appeal, answered that question in the negative. Mitter, J., in his judgment, which was concurred in by the majority of the Full Bench, no doubt says that the only

(1) 4 C. 576. (2) 17 C. 131. (3) 17 C. 726. (4) 11 C. 175; 17 C. 131.

thing recoverable under Reg. V of 1812 "is the amount which is by the contract fixed as the rent payable to the landlord." But in an earlier part of the judgment he has taken care to premise that the Regulations do not define an *abwab*; and that the question, whether any particular item is an *abwab*, is left to be determined by the Court in each case. The Privy Council affirmed the decision of the Full Bench, simply on the ground that the amounts claimed being old *abwabs*, and not having been consolidated, were not recoverable under Reg. VIII of 1793.

In *Radha Prosad Singh* v. *Balkowar Koeri* (1), the question referred to the Full Bench was whether certain portions of the claim denominated *sarak*, *neg* and *khuruch*, were illegal cesses or whether they were recoverable as rent by reason of their having been paid for a long time. The Full Bench answered the first part of the question in the affirmative, and the second in the negative; and the majority of the learned Judges took the same view of Reg. V of 1812 that the Full Bench in *Chultan Mahton's* case (2) did. The fact of the Full Bench having overruled the decision in the case of *Pudmanund Singh* v. *Baij Nath Singh* (3), which was in some, but not all, respects similar to the present case, no doubt furnishes an argument in favour of the respondent; but that argument is not conclusive, because the majority of the Full Bench base their conclusion that *Pudmanund Singh's* case (3) was wrongly decided, not upon the ground that the items there claimed **[690]** and allowed, were kept separate from the amount styled the rent, and were therefore not recoverable, but upon the ground that they were from their very nature no part of the ground rent, the items being *salami* and *tehwari*. And Mr. Justice O'Kinealy, whose judgment appears to be the one that was concurred in by the majority of the Full Bench, adopts the following as the correct definition of the term *abwab* :—

"This term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *asul* or original standard rent in the nature of addition thereto." Such a definition, as we have pointed out above, would be wholly inapplicable to the present claim. The learned Chief Justice, it is true, says in his judgment that, according to the decision of the Privy Council in *Chultan Mahton's* case (2) under the Regulations, nothing could be recovered for the occupation of land, except one sum, which must include everything which was payable for such occupation, arrived at, either by agreement or by some judicial determination between the parties, but this observation must, we think, be taken to be limited in its application to the class of cases by which his Lordship and the Judicial Committee were then dealing with, which were cases in which the disputed items were either admittedly, or in their nature, *abwabs*, and could be legalized only on the ground of being consolidated with the *asul* or ground rent. That, however, is not the nature of the item now in dispute.

These cases do not, therefore, in any way decide the question now before us, which is whether an amount agreed to be paid by a *putnidar* to the zemindar on account of chowkidari tax is an *abwab*, though there are no doubt *dicta* laid down in the judgments of some of the learned Judges which might be construed to bear upon that question. We are not aware of any case in which a claim like the present has been considered illegal and untenable. On the contrary, a claim similar to the one now under consideration, was allowed as legal in the case of *Surnomoyee Dabee*

(1) 17 C. 726. (2) 11 C 175; 17 C. 131. (3) 15 C. 828.

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v. *Koomar Purresh Narain Roy* (1) already **[691]** referred to. That case seems to us to be quite in point and fully supports the view we have taken above.

In the above view of the case it becomes unnecessary to consider the effect of s. 179 of the Bengal Tenancy Act, which enacts that "nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *moukurari* lease on any terms agreed on between him and his tenant." There is, no doubt, some repugnancy between this section and s. 74 of the Act, but whether, following the principle enunciated by Lord Justice James in *Ebbs* v. *Boulnois* (2), we regard the latter, which is a special provision, as a qualification of the former, which is a general one, or, adopting the rules stated by Keating, J., in *Wood* v. *Riley* (3), that of two repugnant clauses in a Statute the last must prevail, give effect to the latter, there seems to be good reason for thinking that s. 179 is not controlled by s. 74. But, as we have said above, we need not discuss this point any further.

For the foregoing reasons, we think the decision of the lower appellate Court that the amount claimed is in the nature of an *abwab*, and therefore not recoverable, is wrong in law. But as we hold that the claim is one for rent, part of it, namely, that for 1294, must be held to be barred by limitation. Moreover, as we gather from the plaint that there was a previous suit for rent, so much of the amount now claimed as had accrued due at the date of the institution of that suit, must be held to be barred by s. 43 of the Code of Civil Procedure.

The result is that the decree of the lower appellate Court must be set aside, and the case remanded to that Court to determine how much of the claim is barred for the two reasons indicated above, and to decide the other points raised in the appeal before it.

S. C. G. *Appeal allowed and case remanded.*

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22 C. 692.

[692] APPELLATE CIVIL.

Before Mr. Justice Norris, Mr. Justice Banerjee and Mr. Justice Rampini.

DHANI RAM SHAHA (*Plaintiff*) v. BHAGIRATH SHAHA AND OTHERS (*Defendants*).* [17th January, 1895.]

Res judicata—*Partnership—Suits by different partners for specific sums of money on adjustment of accounts—Accounts adjusted by Amin appointed in previous suits—Civil Procedure Code*, s. 13, *explanations ii and iii*, s. 43—*Plaint, Amendment of, under* s. 53, *Civil Procedure Code—Court Fees Act* (*VII of* 1870), s. 7, *paragraph iv, cl.* (*f*)—*Suits Valuation Act* (*VII of* 1887), s. 8.

After dissolution of a certain partnership, two separate suits were brought in 1889 by different partners for specific sums of money due to them, and, in the alternative, for such other amount as might be found due on an adjustment of accounts. Objections were raised against these suits on the grounds, *inter alia*, (1) that the suits were barred by the provisions of s. 265 of the Indian Contract Act; (2) that separate suits for the same matter were not maintainable; (3) that the suits would not lie in the Munsif's Court; and (4) that accounts having been

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* Appeals from Appellate Decrees Nos. 950, 951, 952 and 953 of 1893, against the decree of R. H. Graves, Esq., District Judge of Sylhet, dated the 31st of January 1893, affirming the decree of Babu Surut Kishore Bose, Munsif of Habigunge, dated the 16th of February 1892.

(1) 4 C. 576. (2) L.R. 10 Ch. Ap. 479 (484). (3) L.R. 3 C. P. 26 (27).

already adjusted there was no cause of action. The Munsif overruled the first three objections, and held, as regards the fourth, that the adjustment pleaded had been ratified by the plaintiffs; he appointed an Amin who examined the accounts and ascertained the respective claims of the partners, and the plaintiffs in those suits obtained decrees on the basis of the Amin's adjustment of account

The present suits were brought in 1891 by certain other partners who were defendants in the suits of 1889, on the allegation that the partnership account had been already adjusted by the Amin appointed in the suits of 1889, and that the debts and dues of all parties had been determined by the Court. The plaintiffs prayed for recovery of the amount due to them under the Amin's adjustment, and, in the alternative, for such other relief as might be deemed proper by the Court to grant them against any of the defendant.

Held by NORRIS and BANERJEE, JJ. (RAMPINI, J., dissenting)—

(*a*) That neither s. 13 nor s. 43 of the Civil Procedure Code was a bar to the present suits.

(*b*) That under the provisions of s. 7, para. iv, cl. (*f*) of the Court Fees Act (VII of 1870) and s. 8 of the Suits Valuation Act (VII of 1887), the suits were properly brought in the Munsif's Court—*Ladubhai Premchand* v. *Revichand Venichand* (1) followed.

[693] (*c*) That the suits were correctly framed, and that such defects as there were in the plaint, *viz.*, an incorrect statement as to the dues of all the partners having been determined in the former suit, and the omission of an alternative prayer for an account, were no bar to the maintenance of the present actions—*Taylor* v. *Shaw* (2), *Stupart* v. *Arrowsmith* (3) and *Lalla Sheoprosad* v. *Juggernath* (4) referred to. *Prosad Doss Mullick* v. *Russick Lall Mullick* (5) distinguished.

(*d*) That an amendment of the plaint under s. 53 of the Code of Civil Procedure should be allowed *Choper* v. *Smith* (6) followed. *Weldon* v. *Neal* (7), *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (8), *Joseph* v. *Solano* (9), *Ramdoyal Khan* v. *Ajoodhia Ram Khan* (10), *Kurtz* v. *Spence* (11) referred to.

Held by RAMPINI, J.—That there was ground for contending that, under explanations *ii* and *iii* to s. 13 of the Civil Procedure Code, the present suits were barred; and that the amendments proposed to be made in the plaint could not be allowed under s. 53 of the Code of Civil Procedure.

[R., 5 C.W.N. 273 (279); 10 Ind. Cas. 218 (220) = 21 M.L.J. 475 = 9 M.L.T. 499.]

THE parties to these suits were members and heirs of members of a partnership which was dissolved on the 19th Chait 1294 B. S., corresponding to the 31st March 1888. In 1889, two suits were brought by some of the partners (No. 958 of 1889 by Raghunath Shaha and others, and No. 959 of 1889 by Durga Charan Shaha and others) against the rest of the partners, as defendants, in the Munsif's Court at Habigunge, and in each case a specific amount of money was claimed as due to the plaintiffs, and, in the alternative, such other amount as might be found to be due on an adjustment of accounts. In those suits some of the defendants (Nos. 13 and 24 included) raised objections, on the grounds, among others, (*a*) that the suit as framed was barred by the provisions of s. 265 of the Indian Contract Act; (*b*) that separate suits for the same matter were not maintainable; (*c*) that the suits did not lie in the Munsif's Court; and (*d*) that the accounts having already been adjusted there was no cause of action. The Munsif overruled the first three objections, and, as regards the fourth, he held that although there had been a *nikas* or adjustment of accounts at the **[694]** instance of the creditors, the plaintiffs had not ratified it. He accordingly appointed an Amin (Commissioner) to examine the *nikas* papers, and the Amin examined them and ascertained the state of

(1) 6 B 143. (2) 3 Sim. & St. 12. (3) 3 Sm. & G. 176.
(4) 10 I. A. 74. (5) 7 C. 157. (6) L.R. 26 Ch. D. 700.
(7) L.R. 19 Q.B.D. 394. (8) 11 M.I.A. 468.
(9) 9 B.L.R. 441 = 18 W. R. 424. (10) 2 C. 1 = 25 W. R. 425.
(11) L. R. 36 Ch. D. 770.

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accounts of each partner separately. A decree was made in each of the suits on the basis of the Amin's finding in favour of the plaintiffs for the amounts due to them.

The suits out of which the present appeals arise were brought in 1891. Dhani Ram Shaha, who is appellant in appeal No. 950, was defendant No. 13 in suit No. 958 of 1889 aforementioned. The allegation in the plaint in Dhani Ram's suit was that the partnership account had been already adjusted by the Amin in suits Nos. 958 and 959, and that the debts and dues of all the partners had been determined by the Court, and the prayer was that a decree might be passed for the sum adjusted to be due to him, and, in the alternative, "for any other relief that might be deemed proper by the Court to grant against any of the defendants." The three other suits out of which the appeals Nos. 951-953 arise, were brought by certain other partners and were similar to the suit of Dhani Ram. All these suits were tried together by the Munsif of Habigunge. One of the defendants in these suits, Nobin Chandra Shaha, who was also defendant No. 24 in suit No. 958 of 1889, raised the objection that the suit could not proceed in the present form.

The Munsif dismissed all these suits, and the District Judge upheld the Munsif's decree, on the ground that the suits were barred by the provisions of ss. 43 and 13 of the Civil Procedure Code, that the suits were wrongly framed, inasmuch as they were not brought as suits for dissolution of partnership; and that, if the suits had been brought in that form, the amount in each suit would have exceeded Rs. 1,000 and the jurisdiction of the Court of the Munsif. Further details of the facts material to this report are given in the judgments of the High Court.

The plaintiffs appealed to the High Court.

Babu *Tarakishor Chaudhuri*, for the appellants.

Dr. *Trailokya Nath Mitra* and Babu *Nalini Ranjan Chatterjee*, for the respondents.

The case was first heard before BANERJEE and RAMPINI, JJ., **[695]** who differed in opinion, and the case was thereupon, under s. 575 of the Code, referred, by order of the Chief Justice, to NORRIS, J., for decision.

Babu *Tarakishor Chaudhuri.*—The learned Judge below is wrong in holding that these suits are barred by ss. 13 and 43 of the Code of Civil Procedure. Looking to the prayer in suit No. 953, it is clear there could not be a decree in favour of the defendants in that suit, and the judgment in that case is silent as to the dues of the then defendants. The present question, *viz.*, whether the plaintiffs are entitled to get anything from any of the defendants was never heard of finally decided. Section 43 also cannot apply to this case. It bars a second suit only when the plaintiff in that suit was plaintiff in the first. The principle of *res judicata*, on the other hand, estops the present defendants from objecting to the form of the suit. The issue was raised in No. 958 and the objection was overruled. The other argument on which the learned Judge dismissed the suits is drawn from s. 265 of the Indian Contract Act, and the Form No. 113 in the Fourth Schedule of the Civil Procedure Code. The partnership was dissolved in 1888, and no suit for dissolution was now necessary or maintainable: Lindley on Partnership, 5th edition, pp. 494-500. The form prescribed is not intended to be exhaustive. Treating these suits as suits for accounts the value would not exceed the jurisdiction of the Munsif. *Ladubhai Premchand* v. *Revichand Venichand* (1),

(1) 6 B. 143.

and s. 8 of Act VII of 1887. Then, as regards the objection that the suits were bad, as the claims were based on the adjustment by the Amin, and there was no prayer for a fresh adjustment, there is no real ground for it. Instead of the suits being bad on this account, I contend, if the plaintiffs had made a prayer for a fresh adjustment of accounts, their suits might have been objected to as badly framed. So an action for an account of partnership dealings and transactions on account stated affords a good defence: Lindley on partnership, 5th edition, p. 512, and cases cited therein. It has further been held that an account honestly settled by a majority was binding on the minority: *Robinson* v. *Thomson* (1), and other cases cited in note (*d*), p. 512, **[696]** Lindley on Partnership. Another defence to an action for an account is that the matters in difference have been settled by arbitration: Lindley, p. 514. Hence I submit that the adjustment of accounts made by the Civil Court Amin and accepted and acted upon by the Court in a suit for an account of the very same partnership business, in which all the partners were parties, ought at least to be held as of no less effect than a private award of arbitrators, or at all events then an adjustment of accounts by a majority. But supposing that the proper remedy to be asked for is an adjustment of account, the plaint should be allowed to be amended. Section 53 of the Civil Procedure Code allows such amendment. *Modhe* v. *Dongre* (2), *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (3), *Ram Chunder Shaha* v. *Manick Chunder Banikya* (4).

Dr. *Trailokaya Nath Mitra*, for the respondents.—I will confine my answer to the question of amendment, as the learned Judges (Banerjee and Rampini, JJ.) wanted me to answer only on that question. The amendment allowed by the Code is not an alteration of such a nature as makes the plaint a new plaint. The proposed alteration would make the plaint totally different. The Amin's report in the previous case would be no evidence in these cases, and all the proceedings must be wiped off for starting a fresh litigation; that would be an injustice to the defendants.

Babu *Tarakishore Chaudhuri* was heard in reply.

The judgments of the High Court (NORRIS, BANERJEE and RAMPINI, JJ.) were as follows :—

JUDGMENTS.

NORRIS, J.—This appeal, and the analogous appeals, Nos. 951, 952 and 953 of 1893, were heard by Banerjee and Rampini, JJ., and the learned Judges having differed on a point of law, the appeals have, under s. 575 of the Code of Civil Procedure, read with s. 587, been referred to me by order of the Chief Justice.

The facts out of which the appeal arises are as follows: In 1292 B. S., six persons, *viz.*, the defendant No. 5, the husband of **[697]** the defendant No. 2, the husband of the defendant No. 25, and brother-in-law of defendant No. 26, the father of the defendants Nos. 11 and 12, the defendant No. 9, and one Kebulram Shaha, entered into partnership for the purpose of carrying on a business in hemp at Sunamgunge. The defendant No. 10 was the *gomasta* of the business. He was remunerated by a 2 annas 10 gundas share of the profits; the remaining profits were divisible amongst the six partners in certain shares which are set out in sch. I of the plaint. In 1293 B. S., the constitution of the partnership was changed, by the introduction of five new partners, *viz.*, the

(1) 1 Vern. 465. (2) 5 B. 609. (3) 11 MI.A. 468. (4) 7 C. 428.

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father of the defendant No. 18 (husband of the defendants Nos. 19 and 20), the defendant No. 15, the defendant No. 7, the father of the defendant No. 4, and the defendant No. 8. The defendant No. 10 still remained the *gomasta* of the business on the same terms as in 1292 B.S., and the remaining profits were divisible amongst the eleven partners in certain shares which are set out in sch. I of the plaint.

In 1294 B. S., the constitution of the partnership was again changed. Three partners, *viz.*, the husband of the defendant No. 2, the father of the defendant No. 18 (husband of the defendants Nos. 19 and 20), and the father of the defendant No. 4, died or retired; and four new partners were admitted, *viz.*, the *gomasta* (the defendant No. 10), the defendant No. 3, the plaintiff, and the defendant No. 24. The defendant No. 17 had an interest in the share of the *gomasta*. The defendant No. 10 still remained the *gomasta* of the business, his remuneration being increased to a 3 annas 10 gundas share of the profits, and the remaining profits were divisible amongst the twelve partners in certain shares, which are set out in sch. I of the plaint. The partnership was dissolved by mutual consent on the 19th Chait 1294 B. S.

After the dissolution of the partnership, accounts for each of the three years' trading, showing the debts and dues of the respective partners for each year, were prepared by the creditors of the firm. These accounts were objected to by some of the partners and were not signed by any of them.

In 1889 the partners who had objected to the accounts instituted suits Nos. 958 and 959 of 1889 in the Court of the First Munsif of Habigunge against the other partners. Suit No. 958 **[698]** was brought by the father of the defendants Nos. 11 and 12, and his brother. The present plaintiff was defendant No. 13, and the contesting defendant in this suit. The *gomasta* (defendant No. 10) was defendant No. 24. The nature of the claims made and of the relief in suit No. 958 appears from the following summary of the pleadings and arguments in the Munsif's judgment :—

"Suit for recovery of money on adjustment of accounts."

"It has been alleged on behalf of the plaintiffs that the defendant No. 24, as *gomasta* and sleeping partner, started a business at Sunamgunge, on behalf of the other defendants, for carrying on trade in *ganja*, &c.; that the plaintiffs, as partners to the said business, carried it on, some by using and some without using their names, up to the period in suit ; that the plaintiffs supplied the capital as mentioned in the plaint according to their respective shares ; that the defendants, in collusion with each other, did not adjust accounts and pay their liabilities to the plaintiffs, and therefore the plaint prayed that the accounts be adjusted by Commission, and the plaintiffs be awarded such amounts of money as they might be respectively entitled to get from each of the defendants.

"It is contended, on behalf of the defendants Nos. 2, 3, 6, 8, 11, 12, 13, 15, 16 and 17, that the plaintiffs in this suit and in suit No. 959 having similar interests, separate suits cannot proceed ; that the suit is defective for want of necessary parties and for misjoinder ; that the claim is barred as against the said defendants ; that the defendant No. 24 was *gomasta* of the business ; that with the consent of all the parties everything in connection with the said business was carried on by the said defendant ; that he is alone liable to all the co-sharers ; that this suit is barred by the application of s. 265 of the Contract Act ; and that when

accounts were adjusted by the *gomasta* defendant and the *mohurir* the plaintiffs did not give effect to it for unjust gain.

"The defendant No. 3 contends that he was no partner of the said business and had nothing to do with the loss and profit thereof; that his son Dino Nath was no partner to the said business with his consent; that this defendant obtained no property left by Dino Nath aforesaid.

"The *gomasta*, defendant No. 24, contends that this suit is [699] not tenable in this Court; that the claim for 1292 is barred by limitation; that this answering defendant is not bound to render accounts to the plaintiffs; that the said defendant acted as *gomasta* on behalf of the defendants Nos. 1 and 10; that the accounts of 1292 have been adjusted with them and his debt has been included into their dues; that he has no concern with the plaintiffs; that the accounts of 1293 and 1294 have also been adjusted, and the defendants' debts and dues ascertained; and that the plaintiffs have brought this suit in order to unnecessarily cause loss to him. The other objections taken by him are similar to the preceding written statement."

The Munsif framed the following issues *inter alia* :—

"This suit and suit No. 959 being related to the same business, whether separate claims ought to be entertained?

"Is the suit untenable under the provisions of s. 265 of the Contract Act?

"Does the suit lie in this Court?

"Was there an adjustment of accounts with the consent of the parties?

"What amount is due to which of the plaintiffs according to the accounts, and who is liable for it?"

All these issues were decided in favour of the plaintiffs.

Upon the issue "was there an adjustment of accounts with the consent of the parties?" the Munsif's finding was that there had been an adjustment effected through the creditors of the partnership; that the plaintiffs had objected to such adjustment; and that it had not been signed by either of the partners.

The accounts as adjusted by the creditors were made over to the Amin for examination. He examined them and filed his report in accordance with which the plaintiffs' suit was decreed in modification of their claims against certain of the defendants.

In suit No. 959 the defendant No. 15 in the present suit and his co-sharers were the plaintiffs, and the suit was decreed in modification of their claim against certain of the defendants.

The Munsif's judgments and decrees were upheld on appeal.

The Amin by his report found that Rs. 233 was due to the plaintiff in this suit in respect of his share in the partnership [700] profits for the year 1294 B. S., and this suit is brought for recovery of that sum.

The plaint, omitting the names of the parties and the schedules, is as follows :—

The above-named plaintiff states as follows :—

"1. A business was started at Sunamgunge, &c., for carrying on trade in hemp, etc., according to the shares of the loss and for profit of the partners mentioned in the sch. I given below. In 1294 B. S. the extent of my share was 15 gundas and the remaining shares belonged to the other parties mentioned in the said schedule and the sleeping

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partner, *gomasta* the defendant No. 10. The said business was started in 1292 B. S., and wound up on the 19th Chait 1294 B. S.

"2. In suit No. 958 of 1889, brought by the defendant No. 13 and others, and suit No. 959 of that year, brought by the defendant No. 15 and others, to which all the partners were parties, the accounts were adjusted by the Civil Court Amin, and the debts and dues of all the partners were determined by the Court accordingly, as mentioned in sch. II.

"3. According to the said accounts a sum of 233 rupees 11 annas 5 gundas was due to me on my 15 gundas share for the year 1294 B. S. Notwithstanding repeated demands and attempts were made by me, the defendants failed to pay me the said sum of money. Hence the cause of action in this suit, which has accrued since 19th Chait 1294 B. S., the last date of the business being open, within the jurisdiction of Thana Baliachung.

"4. I, the plaintiff, pray that a decree may be passed against the principal defendant in proportion to 233 rupees 11 annas 5 gundas on my 15 gundas share with costs of Court, or a decree may be passed for any relief that might be deemed proper by the Court to award me against each of the defendants. Dated 10th Chait 1297."

The contesting defendants' written statement was as follows :—

Suit for recovery of 233 rupees 11 annas 5 gundas according to an adjustment of accounts.

"1. The plaintiff has no cause of action against me, and the plaintiff's suit cannot proceed in its present form.

"2. The plaintiff's claim is barred by limitation.

[701] "3. The business in dispute was carried on by removing old partners and taking new ones in their place every year, and by making difference in the shares, and, according to the plaintiff's own statements, the debts and dues as between co-sharers were differently determined. Under such circumstances the plaintiff's suit brought, as it is, by joining together the debts of unconnected persons, is bad.

"4. The business in dispute being carried on within the jurisdiction of Sunamgunge, the plaintiff's suit cannot proceed in this Court.

"5. I never held the post of *gomasta* of the disputed business on behalf of all the partners, plaintiff and others. I hold no monetary concern with the plaintiff, and I am not liable for the claim in this case, and the plaintiff is not entitled to get it. The plaintiff's suit is entirely false.

"6. Being appointed by the defendants Nos. 1 and 5, I have been holding the post of *gomasta* under them in connection with the disputed business since long before the years in dispute, at a loss and profit to the extent of 6 annas of their shares considered as 16 annas. The accounts were closed up to the year 1295 B. S. and I was in debt to a certain amount to the defendants Nos. 1 and 5, for which they sued me and realized their dues. I am not and cannot be in debt to any other person in connection with the business mentioned in the plaint till 1295 B. S.

"7. Owing to my being on bad terms with the defendants Nos. 1 and 5, and Goloke Chunder Shaha, brother of the defendant No. 5, Goloke Chunder Shaha aforesaid took possession of the *nikas* papers up to 1295 B. S., and caused this false suit to be brought by the plaintiff in order to cause loss to me. The cases alluded to by the plaintiff are now pending in an appeal preferred by me. I therefore pray that your Worship may

be pleased to dismiss the suit and award me my costs. Dated 2nd Assar 1298 B. S."

Upon these pleadings the Munsif framed the following issues, *viz.* :—

" Is the suit barred by ss. 13 and 43 of the Code of Civil Procedure?

" Is the suit barred by time?

" Which of the parties are liable to pay, and for what amount?"

[702] The Munsif decided the first issue in favour of the defendants and gave no decision on the others. His judgment is as follows :—

" *Issue No.*1.—On the last hearing day when the cases were opened, then I thought it necessary to frame this issue, though the parties did not raise this point, still for the sake of justice, as can be allowed, having consistency with the law, I thought that I was bound to raise such a point and to determine it before I would go on with other points. It has been an admitted fact that, in the previous suit brought by defendants Nos. 13 and 15 of suit No. 261, all the plaintiffs and other partners had been made parties, and in that suit the liabilities of all the parties had been settled, though through the laches of these plaintiffs they did not obtain decrees for their shares of the money. There being only one *karbar* among all these partners, there is only one cause of action, and there can be only one suit, as it will appear from paragraph 4 of art. 113 of the Fourth Schedule, Civil Procedure Code. It is not the intention of the law that for the claim of each partner a separate suit would be brought. It matters not whether a partner appears in such a suit as a plaintiff or a defendant.

" The partnership and partition suits are the only classes of suits where, at the instance of one, others may get their interests realized. In such suits it is no uncommon thing that sometimes the plaintiff brings the suit for the benefit of others and loss of his own. In my opinion the present plaintiffs should have got their reliefs in the previous suits, and no fresh suits as laid now can be entertained by any Court. This view of the principle of law will be supported by the rulings reported in Indian Law Reports, 7 Calcutta, p. 428; Indian Law Reports, 3 Calcutta, pp. 353 and 785. On this view of the law I find that the present suits of the plaintiffs are barred and decide this issue in favour of the defendants."

The plaintiff appealed. The District Judge affirmed the decision of the Munsif and dismissed the appeal with costs. His judgment is as follows :—

" The circumstances of these cases are peculiar. The parties were partners (or they are representatives of partners) in a business for the sale of *ganja*.

" In 1889, suits Nos. 958 and 959 were brought in the First [703] Court, Habigunge. In suit No. 958, Raghu Nath Shaha and Ram Churn Shaha were plaintiffs. In suit No. 959 Durga Churn Shaha, Hori Churn Shaha, Ram Churn Shaha, and Ishuri Dasi, representative of Kartik Ram Shaha, were plaintiffs. The prayers in the two suits were very much the same. In each suit it was asked that the accounts of the business might be adjusted, and that the plaintiffs might recover the sums found due to them. The Munsif deputed the Civil Court Amin to examine the accounts of the firm and to submit a report. This was done, and in each suit the Munsif found what was due to the plaintiffs and gave decrees accordingly.

" It is admitted that the parties in the suits now under consideration were parties in the suits Nos. 958 and 959. In fact, the claims in these suits are based on what was done in those suits.

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"In the plaint in each of the five suits under consideration it is alleged that the accounts of the business were adjusted by the Amin, and that it was established by the Court that a certain sum was due to the plaintiff. The prayer in each suit is for the recovery of the sum which was found to be due in the suit No. 958 or 959 of 1889.

"It seems that when issues were first drawn up by the Munsif there was no issue as to whether the suit was barred under s. 13 or 43, Act XIV of 1882. Such an issue was subsequently raised and was determined against the plaintiffs. The appellants' pleaders have contended that the point was not raised in the written statements of the defendants, and that the Munsif was wrong to draw up such an issue.

"It is true that the defendants did not in their written statements directly raise this point. They asserted that the suits could not proceed in the form in which they have been instituted.

"It has not been shown that the defendants raised any objection in the original suits to the first issue. I think it was an issue which the Munsif was bound to frame. It was necessary for him to decide the question whether he had power to try the suits.

"I am not quite sure that the provisions of s. 13 of Act XIV of 1882 apply in these suits. It is true that the parties in these suits were parties in suits Nos. 958 or 859 of 1889, and that **[704]** each had in one of those suits the opportunity of proving what was due to him. It is true, too, that the Amin found what was due to each. It does not, however, appear that the Court embodied in the decree the finding of the Amin in respect of the sums due to any one but the plaintiffs in those suits.

"It may, perhaps, be said that the matter in issue in these suits was not heard and finally decided in suits Nos. 958 and 959. On the other hand, it may fairly be said that plaintiffs assert that that matter was finally decided, and that they base their claims on that decision. This is true, and I think that it is not open to plaintiffs to base their claims on the findings in suits Nos. 958 and 959, and then ot say that the questions raised were not finally decided.

"But there are other reason which seems to me to afford good grounds for the Munsif's orders. The suits now under consideration are not brought on the lines of a suit for dissolution of partnership. In *Prosad Das Mullick* v. *Russick Lal Mullick* (1) there is as follows: "Now, in the first place, it is a settled principle that a separate action by one partner against another partner will not lie unless the cause of action is so distinct from the partnership accounts as not to involve their consideration." It seems to me that when one partner sues other partners respecting their joint business, he must sue on the lines laid down in Form No. 113 of the Fourth Schedule of Act XIV of 1882. In such a suit each partner can recover what is due to him. It certainly seems hard that the plaintiffs in these suits should be unable to recover what the Amin found was due to them, but I think the lower Court is right in holding that such suits will not lie.

"It appears that if a suit had been brought for the dissolution of partnership, or the winding-up of accounts, it would not have been within the jurisdiction of the Munsif. The amount in suit would have exceeded Rs. 1,000. All the appeals are dismissed with costs."

(1) 7 C. 157 (163).

In second appeal it is argued that the lower Courts are wrong in holding the suit to be barred by ss. 13 and 43 of the Code of Civil Procedure.

[705] *Secondly.*—That if the principle of *res judicata* applied at all, it was in the plaintiff's favour, and operated to prevent the defendant from pleading that the suit as framed would not lie.

Thirdly.—That the lower appellate Court was wrong in holding that the only form of suit open to the plaintiff was one for winding-up the partnership under s. 265 of the Contract Act in the form prescribed in Form 113 to sch. IV of the Code of Civil Procedure.

Fourthly.—That the lower appellate Court was wrong in holding that the Munsif's Court would have had no jurisdiction to try the suit if it had been brought under the provisions of s. 265 of the Contract Act in the form prescribed in Form 113 to sch. IV of the Code of Civil Procedure.

It was also urged that, even if the suit was badly framed, if it was not barred, the plaint should be returned for amendment.

I am of opinion that s. 13 of the Code of Civil Procedure is no bar to the present suit.

In suits Nos. 958 and 959 of 1889 the then plaintiffs claimed specific sums from the then defendants, and they obtained decrees for specific amounts. The issue raised in this suit, *viz.*, the right of the present plaintiff to recover a specific amount from the now defendants, was neither directly and substantially in issue in those suits, nor even constructively. I am also of opinion that s. 43 of the Code of Civil Procedure does not bar the suit. The provisions of that section can only apply when the plaintiff is the same in both suits. In support of his second contention the learned vakil for the appellant pointed out that the frame of the present suit was to all intents and purposes the same as the frame of suits Nos. 958 and 959 of 1889; that the only material point of difference was that in the present suit a specific amount is claimed upon the allegation that the accounts had been adjusted in the presence of all the parties, whereas in the former suits a specific amount was claimed after adjustment of the accounts; that an issue was distinctly raised as to whether the suits were properly framed having regard to the provisions of s. 265 of the Contract Act, and decided in favour of the plaintiffs. This argument was not, as far as I can gather, addressed to the learned Judges who **[706]** first heard the appeal, and, having regard to the view I take of the learned vakil's other contentions, it is not necessary to express an opinion upon it.

With respect to the third and fourth contentions of the learned vakil for the appellant, I entirely concur with the observations of Banerjee, J., to which I cannot usefully add anything. I also agree with that learned Judge in the conclusion he has arrived at as to the returning of the plaint for amendment.

BANERJEE, J.—The suit out of which this appeal arises was brought by the plaintiff appellant on the allegation that he and the defendants were members of a partnership for carrying on trade in hemp, &c., which was started in 1292 and wound up in Chait 1294; that the share of the plaintiff in the business was 15 gundas; that in1889 two suits were brought, being suits numbers 958 and 959, by certain of the defendants, who are among the *pro forma* defendants, against the plaintiff, and the remaining defendants, in which the accounts were adjusted by the Civil Court Amin, and the debts and dues of all the partners were determined by the Court as mentioned in sch. II of the plaint; and that, according to the said accounts,

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a sum of 233 rupees 11 annas 5 gundas was due to the plaintiff in his 15 gundas share, which the defendants notwithstanding repeated demands, have failed to pay; and the prayer of the plaintiff is that a decree may be given to him against the principal defendants for the said amount, or for such other relief as the Court may deem proper.

The defence, *inter alia*, was limitation and denial of plaintiff's claim.

The issues upon which the parties went to trial in the first Court were these:—

First.—Is the suit barred by ss. 43 and 13 of Civil Procedure Code?

Second —Is the suit barred by time?

Third.—Which of the parties are liable to pay, and to whom; and, if so, for what amount?

The first of these issues was framed by the learned Munsif, as he says, in his judgment, of his own motion, though the defendants did not raise the point. He decided this issue against the [707] plaintiff, and dismissed the suit without determining the other issues.

On appeal by the plaintiff, the lower appellate Court, while expressing doubts as to the correctness of the Munsif's decision, has nevertheless affirmed his decree, dismissing the suit on these grounds, namely, that the plaintiff, having based his claim on the decision in the former suits, could not be permitted to say that the question now raised had not been heard and finally determined; that the frame of the suit, more over, was bad, it not having been brought as a suit for dissolution of partnership; and that, if the suit had been brought in proper form the Munsif's Court would not have had jurisdiction to try it.

In second appeal it is contended for the plaintiff appellant:—

First.—That the lower Courts are wrong in holding that the suit is barred by ss. 43 and 13 of the Code of Civil Procedure;

Secondly.—That the lower appellate Court is wrong in holding that the Munsif's Court would have no jurisdiction to try the suit if it was brought in proper form; and

Thirdly.—That the lower appellate Court was wrong in holding that the frame of the suit was bad, and that even if there was any defect in the form of the suit, it ought to have amended the plaint on such terms as to costs as would be just and proper, by the omission of the statement that the dues of all the partners had been determined in the former suit, and by the insertion of an alternative prayer for a decree for an account.

The first contention of the appellant is, in my opinion, quite correct. Section 43 of the Code of Civil Procedure can bar a second suit only when the plaintiff in that suit was also the plaintiff in the first. Here the plaintiff in the present suit was a defendant and not a plaintiff in the former. Section 43 can, therefore, have no application to this case. Nor can s. 13 of the Code be a bar to this suit, for this simple reason, that the matter now really in issue, namely, that involved in the question whether the plaintiff is entitled to recover any thing from any of the defendants, was not heard and finally decided in the former suits either actually or constructively within the meaning of explanation III.

[708] The second contention of the appellant is, I think, equally sound. The learned District Judge says: "It appears that if a suit have been brought for the dissolution of partnership, or the winding-up of accounts, it would not have been within the jurisdiction of the Munsif. The amount in suit would have exceeded Rs. 1,000." But there being no dispute that the partnership was dissolved some years ago, no suit for dissolution of partnership was necessary. And if a suit for winding-up of

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accounts had been brought under s. 265 of the Contract Act, or if the present suit be treated as a suit for an account, still, having regard to the amount at which the relief sought is valued, it would be within the jurisdiction of the Munsif. For such a suit, the court-fee is payable *ad valorem* under s. 7, para. iv, cl. (*f*) of the Court Fees Act. (see *Ludubhai Premchand* v. *Revichand Venichand* (1), and that being so, under s. 8 of the Suits Valuation Act (VII of 1887), the value for purposes of jurisdiction is the same as that for the computation of court-fees, that is, it is the amount at which the relief sought is valued, which is here within the pecuniary jurisdiction of the Munsif.

As regards the third contention, as I have said above, no suit for dissolution of partnership was necessary or maintainable, it being undisputed that the partnership has terminated. Nor was a suit for winding-up the affairs of the partnership necessary or sustainable, seeing that it is neither alleged nor suggested by either side that there are any debts due from the firm to any third party, and seeing also that some of the members of the partnership have, after dissolution of the partnership, already brought suits and obtained decrees for their shares of the partnership assets, and the rights and obligations of the partners can no longer, therefore, be regarded as continuing as contemplated by s. 263 of the Contract Act. It is also open to question whether a suit for an account would lie. In the former suit, to which all the partners were parties, it was proved that a *nikas* was effected through the creditors of the parties; that *nikas* was examined by the Civil Court Amin, who prepared an account, and a decree was made in favour of the plaintiffs in that [709] suit upon the basis of that account. Moreover, defendant No. 10, the only defendant who put in any defence in this suit, urges in para. 6 of his written statement, that the accounts were closed up to 1295 B.S. Now, to an action for an account of partnership transactions, an account already stated and settled between the parties would be a good defence. See *Taylor* v. *Shaw* (2), *Stupart* v. *Arrowsmith* (3) and other cases cited in Lindley on Partnership, 5th edition, p. 512. The plaintiff, therefore, cannot be blamed much for framing the suit, as he has done, seeking only to recover his share of the profits of the partnership as shown in the accounts prepared in the former suit, without expressly asking for a fresh account and winding-up, and concluding with the ordinary prayer for such other relief as the Court might deem proper to grant.

There are, however, two defects in the plaint which might have been avoided, and they are, the insertion of the incorrect statement that the debts and dues of all the partners were determined by the Courts in the previous suits, Nos. 958 and 959 of 1889, and the omission of an alternative prayer for a decree for an account if, in the judgment of the Court, the account prepared in the former suit was not a sufficient basis for a decree for the money which the plaintiff claimed as his share of the profits of the partnership. But I should add that there was some excuse for the insertion of the incorrect statement, and the omission of the alternative prayer to be found in the fact that in the former suits the Court accepted the amin's papers as correct, and based its decree in favour of the plaintiffs in those suits on those papers.

The question that now arises for our consideration is whether the suit should be thrown out by reason only of these two defects in the

(1) 6 B. 143. (2) 2 Sim. & St. 12. (3) 3 Sim. & G. 176.

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plaint (the other grounds on which the decrees of the Courts below are based being as shown above clearly untenable), or whether the amendment prayed for should be allowed, and the suit remanded to the first Court for trial on the merits. After giving the question my best consideration, I think the latter is the proper alternative to adopt.

In the first place, I think the plaintiff appellant is entitled to a remand as of right. The preliminary ground upon which the first [710] Court dismissed his suit is clearly erroneous. Then of the three grounds, namely *res judicata*, want of jurisdiction, and error in the form of the suit upon which the lower appellate Court has affirmed the decree of dismissal, the first two have been shown above to be altogether untenable, and, as for the third, the only authority cited in its support, the case of *Prosad Dass Mullick* v. *Russick Lall Mullick* (1) is clearly distinguishable from the present case, there having been here two previous suits by certain of the partners, in which accounts were prepared and decrees recovered by the plaintiffs in those suits. Whether those accounts which were prepared in the presence of all the parties to this suit can afford a sufficient basis for a decree in favour of the plaintiffs in this suit is a question which has not yet been tried by either of the Courts below; and the plaintiff appellant is certainly entitled to a decision of the Court on that question. For the purpose of having such a decision at least, there must be a remand. And the question is, therefore, reduced to this, namely, whether, in remanding the case, we should direct the Court of first instance to amend the plaint as prayed.

I think that under s. 53, cl. (*c*), read with ss. 582 and 587 of the Code of Civil Procedure, we have the power to amend a plaint or to direct the Court below to do so, if we think fit, provided the amendment does not convert a suit of one character into a suit of another and inconsistent character.

I think, moreover, that the amendment asked for does not infringe against the above quoted proviso to s. 53 of the Code. For the suit as framed is one for a certain sum of money, being the plaintiff's share of the profits of a dissolved partnership based on the allegation that the accounts of the partnership have already been adjusted by the Civil Court Amin, and the debts and dues of the partners determined by the Court in two former suits definitely referred to, or for such other relief as the Court may deem fit. The amendment asked for seeks to omit the incorrect statement as to the dues and debts of the partners having been determined by the Court, and to insert an alternative prayer for an account if, in the judgment of the Court, the account prepared in the former [711] suit be not a sufficient basis for a decree for the money which the plaintiff claimed. This, in my opinion, does not alter the character of the suit so as to convert it into a "suit of another and an inconsistent character" within the meaning of the proviso to s. 53. The suit still remains a suit for money, being the plaintiff's share of the profits of a dissolved partnership, and the taking of an account being only ancillary to the principal relief claimed, and being necessary only in the event of the Court deciding that the account prepared in the former suit, to which all the parties to the present suit were parties, is not a sufficient basis for a decree. Indeed, it may well be doubted whether for such a purpose any amendment of the plaint is at all needed, or whether the general prayer for such other relief as the Court may deem fit may not be

(1) 7 C. 157.

sufficient to entitle the plaintiff to ask the Court to go into the accounts if necessary. See *Lalla Sheoprosad* v. *Juggernath* (1).

It only remains now to see whether it is fit and proper that, in the exercise of our discretion, we should allow the amendment and remand the suit. I think it is. The plaint contains all the allegations of fact necessary in a suit for an account, namely, those relating to the parties to the partnership, the share of the plaintiff, and the dates of starting and dissolution of the firm. Then there was, as I have said above, some excuse for the insertion of the incorrect statement now sought to be omitted, about the dues of all the partners having been determined by the Court in the former suit, and for the omission of the alternative prayer for an account now sought to be inserted. Moreover the incorrect statement in the plaint referred to above could not have been made fraudulently, or with intent to overreach, as the suits in which the dues of the plaintiff are stated to have been determined are specifically described by their members, and the judgment in those suits was filed by the plaintiff himself. And though it is true that the suit has been pending for a long time, the plaintiff is not at all to blame, the delay being due to the Courts below having dismissed the suit on erroneous and insufficient preliminary grounds without going into the merits. The amendment that I would allow cannot, therefore, be said to prejudice the defendants, except in the **[712]** matter of costs, as to which the order I should make would be that the appellant should pay to the defendants all the costs incurred by them in all the Courts up to date.

If the amendment I propose to allow had resulted in the inclusion of a new claim, now barred if a fresh suit had to be brought, the amendment might be open to the objection that it would prejudice the defendants, and the case of *Weldon* v. *Neal* (2) might be cited in support of the objection ; though even in that case the Master of the Rolls made some reservation in favour of such amendment, " under very peculiar circumstances ; " and in the case of *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (3) their Lordships of the Privy Council allowed an amendment of the plaint, considering that " a new suit would probably be met by a plea of the Act of Limitation," and that " in the circumstances of the case such defence is inequitable." But in the present case the amendment does not involve the inclusion of any new claim or cause of action in the suit.

In cases like this, I think the right rule to follow is that enunciated by Lord Justice Bowen in *Cropper* v. *Smith* (4), where that learned Judge says : " I know of no kind of error or mistake, which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or of grace."

Though in appeal (L. R., 10 App. Ca., 259) Lord Selborne doubted whether, under the peculiar circumstances of that case, the amendment should be allowed, his Lordship approved the general terms of the observation.

The course I propose to take is amply supported by the authority of decided cases in this Court and in the Privy Council. See *Mohummud Zahoor Ali* v. *Thakooranee Rutta Koer* (3) *Joseph* v. *Solano*(5), and *Ramdoyal Khan* v. *Ajoodhia Ram Khan* (6). It is true that those

(1) 10 I. A. 74. (2) L. R. 19 Q. B. D. 394. (3) 11 M. I. A. 468.
(4) L. R. 26 Ch. D. 710. (5) 9 B.L.R. 441=18 W.R. 424.
(6) 2 C. 1=25 W.R. 425.

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cases were decided under the old [713] law, but subject to the proviso to s. 53 noted above, which is not here infringed against, the new law is just the same in this respect as the old. I may also refer to the case of *Kurtz* v. *Spence* (1) in support of the view I take that the amendment applied for should be granted.

The result then is, that the case should, in my opinion, go back to the first Court, with direction to that Court to amend the plaint under s. 53 of the Code of Civil Procedure by omitting the statement about the dues of all the partners having been determined in the former suit, and inserting the alternative prayer for an account referred to above, subject to the condition that the plaintiff appellant should deposit in the Court of first instance, within one month after the arrival of the record there, all the costs incurred by the defendants appellants up to date. If the deposit is not made as aforesaid within the time allowed, this appeal shall stand dismissed with costs.

What is said above applies also to second appeals Nos. 951 to 953.

But as my learned colleague Mr. Justice Rampini takes a different view, and as the points on which we differ are points of law, we think that the cases should, under s. 575 of the Code of Civil Procedure, read with s. 587, be referred to one or more of the other Judges as the Chief Justice may determine. The cases will accordingly be laid before the Chief Justice.

RAMPINI, J.—The plaintiff in this suit, and the plaintiffs in the analogous suits, sue on the allegations (1) that they were partners in a business which was started in 1292 B. S., and was wound up on the 19th Chait 1294 B. S.; (2) that in suit No. 958 of 1889 brought by the defendant No. 13 and others, and suit No. 259 of the same year brought by the defendant No. 15 and others, to which all the partners in the business were parties, the accounts were adjusted by the Civil Court Amin, and the debts and dues of all the partners were determined by the Court as mentioned in sch. II; (3) that, according to the said accounts, a sum is due to each plaintiff, which after repeated demands the defendants have failed to pay. Hence they pray that decrees may be passed for [714] these sums or for any other relief which may be deemed proper by the Court.

Now in the course of trial before the Munsif, it has been established that these allegations are in the main correct. In suits Nos. 958 and 959 of 1889, as the Munsif says, "the liabilities of all the parties had been settled, though through the laches of the then plaintiffs they did not obtain decrees for their shares of the money." Hence, though the present suits may not be barred in so many words by the terms of s. 13 of the Civil Procedure Code, it is yet clear that the plaintiffs on their own shewing are not entitled to the relief they seek for in these suits. They are not entitled to definite sums of money, as they say they are, because no such sums were awarded them in the previous suits. At the same time I must say that it seems to me doubtful whether these suits are not barred by the provisions of s. 13. The previous suits were for the adjustment of the accounts of the partnership. They were adjusted by the Amin, and though the amounts due to the present plaintiffs were not decreed by the Court, this was the present plaintiffs' own fault. They might have asked the Court to give them decrees for the sums which the Amin found to be due to them, and they would have got them. Hence there is at least ground for contending that, under explanations ii and iii to s. 13,

(1) L. R. 36 Ch. D. 770.

the present suits are barred. However this may be, it is admitted that, on the evidence, the plaintiffs are not entitled to the definite sums of money they sue for, and so it has been suggested that we should amend the plaints in these suits, and in the interests of the plaintiffs convert them into plaints for an adjustment of accounts. I do not think that this should be done, because, *firstly*, I do not think that cl. (*c*), s. 53, which is the only clause under which the plaints can now be amended, contemplates or allows of the making such serious alterations as it is now suggested we should make in the plaints; and, *secondly*, I think to do so would be to contravene the provisions of the proviso to s. 53. What it is suggested we should do would seem to me to be not to amend the plaints, but to make new plaints, in which instead of asserting, as the present plaints do, that the debts and dues of all the partners were **[715]** determined in the previous suits by the Court, it would be necessary to assert the reverse, and to allege that in these previous suits the debts and dues of all the partners were not determined by the Court, and instead of praying that decrees should be given for the sums already found to be due to the plaintiffs, it would be prayed that the accounts of the partnership should be adjusted and decrees should be given for such sums, if any, as the defendants may be found liable for. In short, the amendments which it is suggested we should make or order the lower Court to make, are amendments which, I think, no Court could make for a plaintiff, but are rather such as could only properly be made by his own professional advisers. Then the proviso to s. 53 expressly lays down that a plaint shall not be amended either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character. But if the Court amends the plaints in these suits and asserts for the plaintiffs that the partnership accounts have not been previously adjusted in contradiction to the present allegations in the plaints, and prays for an adjustment of accounts instead of for definite sums of money, is not this turning the suits into suits of another and inconsistent character? Is it not entirely changing the cause of action of the suits? I think it is.

Then it appears to me that s. 53 (*c*) contemplates the amendment of a plaint in such a manner that, after the amendment is made, judgment may be given there and then. However this may be, it does not, it seems to me, contemplate the remand of a case and the holding of a new trial, as it is proposed that we should order and as indeed must be done in these suits, if the plaintiffs are to get any relief. The provisions in the Code with regard to remands are ss. 562 and 566, and neither of them, in my opinion, would justify our remanding these cases. The suits have been fully tried on the allegations set up by the plaintiffs and on the issues arising out of these allegations. No evidence has been excluded, and no new evidence is required to enable the issues arising on the plaintiff's allegations to be decided. Hence I do not think the suits should be remanded so as to enable the plaintiffs to mend their hands and begin the litigation anew.

[716] Further, if we were to accede to the plaintiffs' requests, would it be of any use? Would the suits as altered not be barred under s. 13 of the Civil Procedure Code? The suits would then be suits for adjustment of accounts. The previous suits were suits of this nature. All the parties in the business were partners in the previous suits. The present plaintiffs were defendants in those suits, and therefore may be said not to have asked for any relief in their *plaints*. But in suits for the adjustment of

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partnership accounts, as in interpleader suits, surely all the parties are to be regarded as plaintiffs, and as seeking for relief though they may claim it, not in plaints but in written statements.

The course which I think should be adopted in these cases is to allow the plaintiffs to withdraw their suits under s. 373 and to give them permission to bring new suits, if they please. They are not anxious to be allowed to do this, as it is apprehended the new suits will be barred by limitation. It is, however, not clear that this will be the case, and anyhow this is not a consideration that need weigh with us.

It may be hard from the plaintiff's point of view that they should have no relief ; but if this be the case, it is entirely their own fault. They might have had relief in the previous suits, if they had chosen to ask for it. They might, perhaps, have had relief in the present suits, if they had been properly framed, though the form of the present suits may have been purposely adopted so as to evade the provisions of s. 13. But the plaintiffs chose their own line of attack, and they are responsible if it fails. As the learned pleaders for the respondent have observed, justice is not a monopoly of plaintiffs. Defendants have as much right to justice or indulgence (which is what is wanted in these suits) as plaintiffs. And the policy of the law is *ut sit finis litis*, and it, therefore, enacts that a suit is barred if not brought within a certain time, and that a defndant should not be harrassed by repeated suits about the same matter, it would seem to me to be unjust to the defendants in these suits not to allow them the advantage of these provisions of the law.

S. C. C. *Appeals allowed.*

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22 C. 717.

[717] ORIGINAL CIVIL.

Before Mr. Justice Sale.

IN THE MATTER OF SECTION 45 OF THE SPECIFIC RELIEF ACT (I OF 1877), AND IN THE MATTER OF BENGAL ACT II OF 1888, AND IN THE MATTER OF W. CORKHILL AND ANOTHER. [2nd April, 1895.]

Municipal election—Specific Relief Act (I *of* 1877), *s.* 45—*Election law—Calcutta Municipal Consolidation Act* (*Bengal Act II of* 1888), *ss.* 8, 14, 20, 21, 22, 23, 31, 32—*Municipal Commissioner, Election of—List of voters—Chairman, Jurisdiction of*—Quo Warranto.

There is nothing in the Calcutta Municipal Act (Bengal Act II of 1888), or in the Local Government Rules issued under s. 19 of the Act, which requires that the name of a candidate, or of the proposer, seconder, or approver of a candidate, at a municipal election, should be published in the revised list of voters.

Sections 20 and 23 of the Act only lay down rules applicable to voters ; they do not control the qualifications of the proposers, seconders, or approvers.

Sections 8, 14, 20, 22, 23, 31, 32 discussed.

Semble.—The High Court has jurisdiction by a proceeding in the nature of a *quo warranto* to restrain a person who has not been duly elected from exercising the functions of a duly elected Commissioner.

The Chairman has no judicial discretion in preparing the list of candidates.

In the matter of Mutty Lall Ghose (1) approved.

Under s. 31 of the Act, every candidate for election must send in his name to the Chairman not less than seven days before the day fixed for election, together with the names of his proposer, seconder, and approvers. The Chairman has no power to waive this rule. Where there is a *prima facie* compliance with s. 31 of the Act, the Chairman has no power to go further and determine questions affecting the status of persons claiming to be candidates.

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(1) 19 C. 192.

The Chairman can only revise the original list of voters in the manner laid down by s. 22, or on applications made under s. 21, or in pursuance of an order from the Presidency Magistrate under s. 23.

The issue of a supplementary list of voters is not sanctioned by the Act.

A definition of the term "elector" with necessary qualifications is given in s. 8 of the Act. There is nothing in the Act preventing a person qualified to vote under s. 8 from voting, although his name does not appear on the revised list of voters.

The only prohibition is that found in the Local Government Rules issued under s. 19 of the Act.

[718] ON the 21st of March 1895 a rule was obtained by Rojoni Mohun Chatterji, calling upon Captain W. Corkhill, the Corporation of Calcutta, and the Chairman of the Corporation, to shew cause why the Chairman should not be directed to strike out Captain Corkhill's name from the list of candidates elected at a recent municipal election and to substitute in his place the name of Rojoni Mohun Chatterji, an unsuccessful candidate, and why Captain W. Corkhill should not cease to act as Commissioner for Ward No. 18 (Hastings' Ward).

At the election of Municipal Commissioners in March 1895, there were three candidates for Ward No. 18: Captain W. Corkhill, Mr. C. F. Deefholts, and the petitioner Babu Rojoni Mohun Chatterji. Mr. Deefholts and Captain W. Corkhill were duly returned as Commissioners. On the 12th and 13th of March 1895, and previous to the election, the petitioner, by a letter to the Chairman, took exception to the candidature of Captain Corkhill, mainly on two grounds: (1) That one of the proposers at the election of Captain W. Corkhill, Mr. B. P. Quinan, was not an elector, his name not being on the list of voters, the only name resembling it being that of M. Quinan. (2) That the names of four out of the eight approvers required by the Municipal Act were not on the list of voters. The rule came on for hearing on 3rd April 1895.

Mr. *O'Kinealy*, for Captain Corkhill.

Mr. *Phillips* and Mr. *Palit*, for Rojoni Mohun Chatterji.

Mr. *O'Kinealy*, to shew cause.—The name B. P. Quinan does not appear on the list, it is true, but M. Quinan does. The initials are the initials of his wife, but there is no other Quinan in the ward, and there can be no mistake as to who is meant. The error arose through a correspondence, which took place between the Corporation and the proposer. The proposer's letters were written by his wife. The misspelling of a name by a clerk would, on the contention of the other side, disqualify a man from voting. On an objection being taken, another proposer, Mr. W. G. Hannay, was obtained, and his name inserted on the 12th of March. As to the second objection, it is true that the names of four approvers did not appear on the list, but no application was made under s. **[719]** 31 of the Municipal Act, to have them put on. They were subsequently put in a supplementary revised list. This is said to be an irregularity. It is absurd to contend that the Chairman had no power to add them afterwards to the list. He has absolute power, and it is no irregularity to add afterwards names omitted through an oversight of the officials. This Court has no jurisdiction to correct the irregularities of the Chairman, unless he exercises a jurisdiction which he does not possess, or exceeds a jurisdiction which he does possess. The Chairman has ample jurisdiction under s. 45 of the Act. If there is any dispute between the parties and the Chairman, the proper tribunal is the Court of the Chief Presidency Magistrate, not the High Court. The Court is asked, not only to set the election aside, but to set it aside in favour of one who would never have a chance of

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being elected on his own merits, but who was trying to get in against the wishes of the electors by means of this rule. Orders under s. 45 of the Specific Relief Act, are in the nature of a *mandamus* or *certiorari*, and ought to issue only, where a Court or officer has exercised a jurisdiction not vested in it or him; not where the jurisdiction had been exceeded or exercised irregularly. *Reg.* v. *Overseers of Walshall* (1), *Nundo Lal Bose* v. *The Corporation of Calcutta* (2), *Reg.* v. *Collins* (3). In s. 45 of the Specific Relief Act, the words "right and justice" do not mean the legal aspect of a case, but right and justice in accordance with its real merits. [SALE, J.—Need a candidate be on the list of voters?] Not if he is otherwise qualified to vote. All objections as to the list of voters and the validity of the votes are to be heard after the election by the Chairman, whose decision is declared to be final.

Mr. *Phillips*, in support of the rule.—It is the duty of the Chairman and the Corporation to see that the right man is elected. If they cannot say who is the right man, it does not displace this Court's power to do so. The proposer, seconder, and candidate must all be qualified to vote. These matters have under s. 22 to be decided by the Chairman, but his decision is not final. The Chairman has no right to publish the name of any candidate, **[720]** who has not complied, or whose nominators and approvers have not complied, with the requirements of the Act. Section 29 only provides that the incorrectness of the list should not of itself invalidate the election; it does not purport to interfere with the rights of the voters. Captain Corkhill was never a proper candidate. The Chairman felt that he was not, but seemed to think that by certain acts of his he had made him a proper candidate. The distinction between voter and elector is not well founded. An elector cannot be a person who cannot vote. Candidates must be voters themselves, before they can ask other people to vote. The candidate and his proposer must all be part of the constituency. An outsider cannot be a candidate. He must be a male person, residing and paying rates in Calcutta, and a person qualified to vote. According to the argument of the other side, a voter is subjected to a severe scrutiny, but a candidate and proposer are not. The rule as to seven days (s. 31) is made in precise terms, and is not subject to the Chairman's convenience. He cannot waive it and say, "I do not want the time." The Chairman's functions are purely ministerial. B. P. Quinan is not the same person as M. Quinan. There was a difference of sex. M. Quinan is admittedly a woman, and therefore incapable of municipal functions. If his mother-in-law had written the letter and not his wife, and been put on the list, would he have been qualified? It is not a mere clerical mistake. [SALE, J.—Mr. Hannay's name was substituted.] That was only four days before the election, when it was too late. As regards the names of the four approvers, they were not in the list at all. The Chairman put them in of his own motion. He had no right to do so. It was *ultra vires*. This is really a motion in the nature of a *quo warranto* or a *mandamus* to compel the Chairman to recognise the claims of Rojoni Mohun Chatterji. The cases cited by the other side are cases of Judicial jurisdiction.

ORDER.

SALE, J.—This is a rule in the nature of a *quo warranto* calling upon Captain William Corkhill, and the Chairman and Commissioners of the Corporation of Calcutta to show cause why an order should not be made

(1) 3 Q. B. D. 457. (2) 11 C. 275. (3) 2 Q. B. D. 30.

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directing the Chairman to remove the name of Captain William Corkhill from the list of elected Commissioners for Ward No. 18, and to substitute, in lieu thereof, the name of [721] Babu Rojoni Mohun Chatterji, the petitioner; why the said Chairman should not be restrained from publishing the name of Captain Corkhill in the *Calcutta Gazette*, under s. 19 of Bengal Act II of 1888, as an elected Commissioner for that Ward; why the name of Babu Rojoni Mohun Chatterji should not be published in the *Calcutta Gazette*, as the duly elected Commissioner of that ward; and why Captain Corkhill should not be restrained from acting as an elected Commissioner for the said Ward.

Cause has now been shown on the part of Captain Corkhill alone.

The relief which the petitioner seeks is based upon the ground that Captain William Corkhill, a candidate for election as Municipal Commissioner for Ward No. 18 at the recent municipal election, which was held on the 16th of March last, was not a duly qualified candidate, and that his election was invalid. It appears that during the election, to which I have referred, there were three candidates for Ward No. 18: Captain William Corkhill, Mr. C. F. Deefholts, and the petitioner, Babu Rojoni Mohun Chatterji. The result of the election, as declared by the Chairman, was, that Captain William Corkhill obtained 52 votes, Mr. C. F. Deefholts 57, and the petitioner 27 votes. Accordingly Mr. Deefholts and Captain Corkhill were declared duly elected Commissioners for the ward.

Previous to the election, and on the 12th March 1895, the petitioner, by a letter to the Chairman of the Corporation, took exception to the candidature of Captain Corkhill, on the ground that his proposer's name, B. P. Quinan, did not appear in the revised list of voters. Subsequently further objection was taken, as appears from the petitioner's letter of the 13th of March 1895, that four of the approvers of Captain Corkhill's candidature were not persons whose names appeared on the revised list of voters. The persons against whom that objection was taken were Mr. Cantopher, Mr. Ben-Lyness, Mr. H. Espino and Mr. D. H. Smith. In order to explain these objections, it is necessary to state that by s. 20 of the Municipal Act II of 1888, the Chairman is directed to prepare a list of all the persons qualified to vote at the election, and to publish such list sixty days before the date fixed for the election. The procedure is prescribed by ss. 21 [722] and 22, and the latter section gives the Chairman the power to revise the list, and to publish the list so revised not less than fifteen days before the date of the election. Under s. 14, a person, who possesses the necessary qualifications to vote under s. 8 of the Act is, subject to the provisions of s. 32, qualified to be elected a Commissioner for any Ward in Calcutta, provided that his candidature is duly announced and his name duly proposed, seconded, and approved, in the manner provided for by the Act. Section 31 provides the manner in which the candidature of a candidate is to be proposed, seconded, and approved. It is enacted by that section that every person who is a candidate for election shall send in his name to the Chairman in writing not less then seven days before the day fixed for the election, together with the names of two electors in each Ward, in which he proposes to stand, who propose and second his candidature, and eight electors in each such Ward, who approve his nomination, and shall state the Ward or Wards for which he proposes to stand.

Now, it appears that the Chairman, in accordance with the procedure laid down for the preparation of the list of voters, published his first or original list in due course, and subsequently published a revised list.

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The petitioner's objection thereupon was, that, inasmuch as the name of the proposer and the names of the four approvers, whom I have mentioned, did not appear in the revised list, the conditions laid down by the Act for the due proposal and approval of the candidate had not been complied with. As regards the first objection, it was sought to be met by substituting for the name of B. P. Quinan, the name of W. G. Hannay, a voter who undoubtedly appears in the revised list; and as regards the second objection, it was sought to be met in two ways: in the first place the names of four approvers were sent in on some date subsequent to the 13th of March, which names also undoubtedly appeared in the revised list. At the same time the Chairman proceeded to issue the list, which he called the supplementary list, of voters, in which he included the four approvers who had been objected to, on the ground that their names had by inadvertence been omitted from the revised list, although they appeared in the revised list which had been [723] prepared for the election in 1892. In that state of facts the first question which arises is: Did the action of the Chairman remove or remedy the objections taken by the petitioner to the candidature of Captain Corkhill, assuming for the moment that the objections were well founded and amounted to a real disqualification? A person to be qualified to be elected a Commissioner for any Ward in Calcutta must, as I have pointed out, under s. 14, duly announce his candidature, and his name must be duly proposed, seconded, and approved, in the way provided for by the Act, that is to say, his candidature must fulfil strictly the conditions laid down by s. 31 of the Act. The question arises as to what meaning is to be applied to the term "electors" as used in s. 31 of the Act. That question it will be necessary to consider presently. For the present purpose I will assume that the term "electors" as used in the section means, persons qualified to elect under s. 8, and whose names appear in the revised list of voters prepared in the manner prescribed by ss. 20 to 23 of the Act.

If this construction of s. 31 be correct, it requires that the proposer, seconder, and approvers of the candidate shall be persons whose names appear in the revised list of voters, and further that these names shall be sent to the Chairman not less than seven days before the day fixed for election. It has been contended, on behalf of Captain Corkhill, that the conditions as to the seven days' notice is one for the benefit of the Chairman, and may be waived by him. I cannot adopt this view, I do not think the Legislature intended to leave it to the discretion of the Chairman to insist upon or to waive this condition, as he might choose. In my opinion it was intended that the condition should be strictly complied with. The proposer, Mr. B. P. Quinan, is, it is admitted, a duly qualified elector under s. 8, but his name has never appeared in the revised list of voters. The name of M. Quinan, which does appear, is admittedly not a clerical error for B. P. Quinan, but is the name of his wife, who, under the Act, is not a qualified elector at all. This objection is not removed by the substitution of the name of W. G. Hannay as proposer, because, though that gentleman is a duly qualified elector under s. 8, and his name does appear in the [724] revised list of voters, yet it was not submitted within the period of seven days before the day fixed for the election. A similar objection must hold good regarding four of the eight names originally submitted as Captain Corkhill's approvers, because the substitution within the period of seven days before the election of the four voters, whose names do appear in the revised list, did not cure the original defect, inasmuch as it did not

amount to a compliance with the condition that the candidate should submit the names of eight electors, as approvers, within a period of not less than seven days before the date fixed for the election. It is contended, however, that this objection was remedied by the inclusion of the four names originally objected to in the supplementary list of voters issued by the Chairman. As regards this contention I must say that I see no sanction in the Act for the issue of any such supplementary list. The Chairman's duty is to publish the general or original list of voters, sixty days before the day fixed for each general election, and, if required, to revise this list in the manner laid down by s. 22. There, in my opinion, his power of dealing with the list of voters ends. He cannot even revise the original list on his own motion at any time. He can only do so upon an application made under s. 21, or in pursuance of orders made by the Presidency Magistrate under s. 23. Further it is to be observed that, under the rules issued by the Local Government, the election is to be made by the voters whose names appear in the revised list, that is to say, the list revised in the manner provided by the Act. Therefore, there is no sanction for the issue of any supplementary list to be found either in the Act or under the rules issued by the Local Government under s. 19 of the Act. But, it is said, if the petitioner is aggrieved by the action of the Chairman, he has sufficient remedy under the Act, and therefore that this Court has no jurisdiction to interfere. I do not find that there is any procedure under the Act, which the petitioner might or could have adopted for the purpose of having Captain Corkhill's name removed from the list of candidates. In objecting to Captain Corkhill's candidature the petitioner was not asking either to have any names removed from the revised list of voters or added thereto. He was not, therefore, a person who could make an application under s. 21.

[725] Now, what was the Chairman's power as regards an application made to him to remove from his list of candidates the name of any person who was said to be a candidate not duly qualified? Had the Chairman any power to reject the name or to exercise any judicial discretion at all as regards the preparation of the list of candidates? In a case entitled *In the matter of Mutty Lall Ghose* (1), Trevelyan, J., held that the Chairman had no such power or discretion. These are the learned Judge's words: "After a careful examination of the sections of the Municipal Act, the counsel engaged in the case have failed, and I have also failed, to find out that there is any thing approaching to a duty incumbent upon Mr. Lee" (the then Chairman) "to exercise any judicial discretion or judicial action with regard to the list of candidates." The learned Judge proceeds: "I think that before I can make the rule absolute, I must see that it was clearly incumbent on Mr. Lee to exclude Mutty Lall Ghose's name from the list which is prepared under s. 31 of the Municipal Act. There is an obligation upon the Chairman to publish a list of all persons who are candidates for election. If the Chairman declined to publish Mutty Lall Ghose's name, the latter might have come to Court and said that it was clearly incumbent upon the Chairman to publish his name. There is no more obligation upon the Chairman than upon any of the Municipal Commissioners to determine the right of a candidate. Looking carefully through the Act and the rules framed thereunder, I cannot find any trace of this obligation or duty anywhere, and no one engaged in the

(1) 19 C. 192.

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case has been able to show me that any such right or duty is given under the Act and rules." I do not think it is intended to be laid down here that, supposing a person had not submitted the name of any approver at all, or submitted a number less than eight, or submitted them within a period less than seven days before the day fixed for the election, the Chairman, in such a case, would be bound to accept the name of that person as a candidate. But what the case is a clear authority for is, that, assuming there has been a sufficient *prima facie* compliance with the condition laid down by s. 31, the Chairman has no power to go further and determine questions affecting the status of persons claiming [726] to be candidates duly qualified under the Act. It is clear, however, that the Act gives the petitioner no remedy as regards the action of the Chairman in declining to remove the name of Captain Corkhill from the list of candidates. The petitioner having no other adequate or suitable remedy, it seems to me that this Court has jurisdiction, corresponding to the jurisdiction exercised by the Superior Courts in England, to give the relief sought, assuming it to be made out that Captain Corkhill was not a duly qualified candidate, and that the election was invalid on that ground. But, as to the latter question, it seems to me that s. 31 creates a serious difficulty in the way of the petitioner. Is there anything in the Act which specifically or by implication requires that the names of either the candidate or his proposer, seconder, or approvers should appear in the list of voters prepared under ss. 20 to 23 of the Act? I can find nothing. Section 31 provides that a candidate for election shall, within the time mentioned, send in his own name, together with the names of two electors in each Ward in which he proposes to stand, who propose and second his candidature, and eight electors in each such Ward who approve his nomination. The word used in the section is, "electors." I may take it, I presume, that "elector" and "person qualified to elect" are synonymous expressions. The qualifications necessary to constitute a person qualified to elect are given in s. 8. He must be a male person, residing or paying rates in Calcutta, who has attained the age of twenty-one years, and shall be qualified to elect in one of the ways mentioned in cls. (*a*), (*b*), (*c*), (*d*), and (*e*). It is not necessary specifically to mention these qualifications, because there is no doubt that Captain Corkhill's original proposers and approvers fulfilled all the conditions of s. 8. No subsequent section creates or superadds any further qualification to constitute a person an elector or person qualified to elect, nor do the terms of s. 8 indicate that the Legislature intended that any new or additional qualification should be required for such person. But, it is said, the elaborate machinery provided by ss. 20 to 23 would be rendered futile and nugatory, unless it be considered that it was the intention of the Legislature that the revised list of voters should furnish [727] the class of persons entitled, not only to vote, but also to become candidates or to propose or approve them. It is a remarkable circumstance that even as regards voters, I mean persons qualified to vote, there is nothing specific in the Act which prevents or disentitles a person, who is qualified to vote under s. 8, from exercising his right in the event of his name not appearing in the revised list of voters. The only prohibition of this nature which exists is that found in the rules of the Local Government issued under s. 19. There is no similar prohibition to be found in the rules, which would disentitle or disqualify a person qualified to vote under s. 8 from exercising his right of either becoming a candidate

or proposing or approving the candidature of some other person. Even assuming that the Legislature intended that the appearance of the name of a voter in the revised list was to be a condition precedent to his exercising the right of voting, it by no means necessarily follows that the Legislature intended to restrict, in a similar way, persons qualified to vote, from becoming candidates or approving the candidature of others. It is conceivable that it should be considered desirable, that the right of voting should be confined to the voters appearing in the revised list, so as to afford to the polling officers an easy and ready method of checking the right of persons claiming to vote during an election. There would not be the same necessity for requiring that the names of candidates and approvers should appear in the revised list, because there would be more time and more convenient opportunity for testing the claims of persons desiring to exercise those rights.

But, even supposing that the Legislature had the intention which the petitioner contends that it had, I am not prepared to say that there is anything in the language of the Act which would justify me in assuming or implying that intention. The absence of language in the Act giving expression to that intention, either specifically or by necessary implication, is, if such was the intention, a defect which can only be cured by fresh legislation, or by appropriate rules to be made under s. 19. I do not think it is open to me to supply any such defect, by what in my opinion would be a forced interpretation, which would have the [728] effect of adding something to the Act which is not now there. I am fortified in the conclusion to which I have arrived by what appears in s. 14 as to the qualification of candidates. That section provides: "Any person qualified to vote under any of the *preceding* sections shall, subject to the provisions of s. 32, be qualified to be elected a Commissioner for any Ward in Calcutta. The qualification, it is to be observed, of a candidate is here defined as a qualification to vote under any of the three *preceding* sections. The express reference to a qualification created by the preceding sections makes it at least doubtful whether the Legislature intended that a new qualification or condition should be imposed by the subsequent ss. 20 to 23.

In the case I have referred to, Trevelyan, J., seemed to be disposed to take the same view of s. 14. At page 196 of the Report, the learned Judge says: "The point in this case is this: Mutty Lall Ghose, who is also a candidate, is on the revised list of voters of Ward No. 1 for the municipal elections to be held to-morrow, for himself and other co-sharers. He is not in the list separately. The portion of the Municipal Act, which deals with persons qualified to be elected, is to be found in s. 14 of the Act. Now the right of a Hindu joint-family to empower a person to vote on their behalf is given by s. 24, which does not precede s. 14. Therefore Mr. Hill contends that a person empowered to vote under s. 24 is not a person qualified to be elected under s. 14. I am bound to say that there is a great deal to be said with regard to that objection, but I do not think that it would be safe, unless it is absolutely necessary, for me to lay down, on such a short consideration, an absolute rule, which might have a serious effect on the exercise of the franchise."

For these reasons I must hold that there is nothing in the Act which requires the names of Captain Corkhill's proposer, seconder, or approvers, to appear in the revised list of voters and that, as they were all persons duly qualified to elect under s. 8, it follows that Captain Corkhill's candidature was duly proposed, seconded and approved, in the manner required by the Act. Captain Corkhill was, therefore, a qualified candidate.

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[729] The petitioner having, therefore, failed to make out any ground for the relief sought, the rule must be discharged, and he must pay Captain Corkhill's costs.

Attorneys for applicant: Messrs. *Morgan & Co.*

Attorney for Captain W. Corkhill: Mr. *Farr.*

C. E. G.

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22 C. 729 (P.C.) = 22 I.A. 90 = 6 Sar. P.C.J. 590 = 5 M.L.J. 77.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, Macnaghten, Shand and Davey and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

ASHARFI LAL (*Plaintiff*) *v.* DEPUTY COMMISSIONER OF BARA BANKI FOR THE COURT OF WARDS (*Defendant*). [5th February, 1895.]

Right of suit—Suit against the Collector as Agent for the Court of Wards—Disqualified owner—Act XXXV *of* 1858 (*Care of the Estates of Lunatics*), s. 11—*Act XVII of* 1876 (*Oudh Land Revenue*), *ss.* 175 *and* 176—*Civil Procedure Code, ss.* 440, 464.

A decree was made against a Deputy Commissioner, as Agent for the Court of Wards, for a debt due from a proprietor, whose estate had come under the charge of that officer in virtue of an order made by the District Court under Act XXXV of 1858, the debtor having been found to be of unsound mind and incapable of of managing his affairs.

The Judicial Commissioner, having called for the record under s. 622 of the Civil Procedure Code, set aside the decree, which had been affirmed on appeal. He was of opinion that the suit should not have been brought against the Deputy Commissioner in the above character, but would only lie against a manager appointed as Act XXXV of 1858 directed, or else against a guardian. This judgment having gone upon a technicality, not well founded, was reversed, and the original decree was restored.

APPEAL from a decree (8th July 1889) of the Judicial Commissioner, setting aside under s. 622 of the Civil Procedure Code, a decree (7th March 1889) of the District Judge of Lucknow, which affirmed a decree (31st August 1888) of the Subordinate Judge of Bara Banki.

The appellant claimed upon eleven money bonds executed to him by Ehsan Husain Khan, proprietor of Tanda Mauza in the perganna and tehsil of Fattehpur, district Bara Banki, for principal and interest at 24 per cent. between the 18th May **[730]** 1883 and the 6th February 1885, all payable before the 30th January 1888 when the suit was brought. Rs. 4,927 were decreed. The defendant was the Deputy Commissioner, who, as Collector of the District, had taken charge, on the 9th April 1886, on behalf of the Court of Wards, of the estate of Ehsan Husain Khan, in virtue of an order dated 17th November 1885 made by the Civil Court within whose jurisdiction Ehsan Husain resided. That order, under s. 11 of Act XXXV of 1858 (for the better provision for the care of the estates of lunatics) directed the Deputy Commissioner to take charge of the estate of Ehsan Husain, who had been adjudged, upon enquiry, to be of unsound mind, and to be incapable of managing his affairs. That section is as follows:—

"If the estate consist in whole or in part of land, or any interest in land not subject to the jurisdiction of the Court of Wards, the Civil Court, instead of appointing a manager, may direct the Collector to take charge of the estate, and thereupon the Collector shall appoint a manager of the property and a guardian of the person of the lunatic. All the proceedings

of the Collector in the charge of estates under this Act shall be subject to the control of the superior revenue authorities."

The provisions of ss. 166, 167, 175 and 176 of Act XVII of 1876, the Oudh Land Revenue Act, are as follow :—

" Section 166.—The jurisdiction of the Court of Wards shall extend to the care and education and to the management of the property of the person subject thereto.

" 167.—The Court of Wards may appoint managers of the property of disqualified proprietors, and if such proprietors be minors, idiots or lunatics, may appoint guardians for the care of their persons, and may remove and control such managers and guardians.

" 175.—All disqualified proprietors whose property is in charge of the Court of Wards shall sue and be sued by and in the name of the guardians where guardians have been appointed.

" Provided that no such suit shall be maintained or defended by any guardian without the sanction of the Court of Wards.

" 176.—If no such guardian has been appointed, the disqualified proprietors shall sue and be sued by and in the name of the Court of Wards."

It was stated in the plaint that promises had been made by Ghazafar Ali Khan, *sarbarakar* of the estate, and in the judgment of the Judicial Commissioner in this suit it appeared that this person had been appointed manager of the property as the Act XXXV of 1858 required.

[731] The defence was that Ehsan Khan was, at the time when he executed the bonds, of unsound mind and incapable of contracting. On an issue as to this, the defence was negatived, and he was found to have been capable of managing his affairs.

On an appeal to the District Judge this decision was affirmed ; no objection having been raised in either of the lower Courts that the defendant did not properly represent the disqualified proprietor, and was not the person to be sued as representing the Court of Wards.

The Judicial Commissioner, on a petition by the defendant putting forward grounds of material irregularity in the conduct of the case and in the admission of evidence, called for the record under s. 622 of the Civil Procedure Code. He found none of these grounds to be tenable. He considered, indeed, that the lower Courts had erred in their view of the evidence as to Ehsan Husain's state of mind ; but held that admissible evidence had been given upon which they had a right to decide, and that there was in the petition nothing to cause him to interfere. He was, however, of opinion that, seeing that Ghazafar Ali Khan had been appointed to be the manager of the estate, in accordance with Act XXXV of 1858, and that, as he found to be the case, the mother of Ehsan Husain was his guardian, the Deputy Commissioner, as Agent for the Court of Wards, was not the person to be sued under the provisions of Act XVII of 1876. He added that if Ehsan Husain himself had been sued, then, under the provisions of the Civil Procedure Code, ss. 440 to 463, it would have been necessary to appoint a guardian, referring also to s. 464 preventing the application of the above sections to a person of unsound mind for whose person or property a guardian, or manager, had been appointed by the Court of Wards.

Mr. *H. Cowell*, for the appellant.—The order of the 17th November 1885 having been made by the Civil Judge under Act XXXV of 1858, and charge having been taken of the estate under it by the Deputy Commissioner, the Courts in the District rightly treated the latter as Agent for the Court of Wards, and as representing the estate liable for

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the debt. The defendant was the right person to be sued in the character of Collector. The [732] Judicial Commissioner was wrong in assuming that a guardian had been appointed, and there had been material irregularity upon which he could act under s. 622. The disqualified proprietor was rightly sued in the name of the Court of Wards under s. 176 of Act XVII of 1876. There was no evidence on which the lower Courts could have done otherwise than permit the suit to proceed; and if, in consequence of the decree having followed, the Judicial Commissioner had been right under s. 622 in making an order, it should have been one of remand and not of dismissal of the suit.

Mr. *J. H. A. Branson* for the respondent.—Under s. 175 of Act XVII of 1876 all disqualified proprietors whose property was in charge of the Court of Wards were to be sued by, and in the name of, their guardians, where guardians had been appointed. It was stated that the Deputy Commissioner had appointed Ghazafar Ali Khan to be manager, or *sarbarakar*, and if, as the Judicial Commissioner believed, a guardian had been appointed to Ehsan Husain, the disqualified proprietor, he was right in deciding that this suit had been wrongly brought against this defendant. A statement had been made, but was not on the record, that Ehsan Husain's wife, not his mother, was appointed guardian. The appellate Court, it might be argued, was right in holding that the Courts below had acted with irregularity in the exercise of their jurisdiction in making a decree against the defendant without ascertaining whether he was the proper person to be sued, and in setting aside the decree on its appearing that he was not.

Mr. *H. Cowell* was not called upon to reply.

JUDGMENT.

Their Lordships' judgment was given by

LORD HOBHOUSE.—The judgment appealed from appears to turn upon a pure technicality. The appellant had lent money to Ehsan Husain Khan on the security of certain bonds. Ehsan Husain subsequently became a lunatic, and was so declared by an order of Court of the 17th November 1885, and his estate was declared to be under the Court of Wards, and was placed under the charge of the Deputy Commissioner of Bara Banki. In other words, it became subject to the administration of the Court [733] of Wards, and the Court of Wards appointed a manager. The appellant brought a suit in 1888 against the Deputy Commissioner for the recovery of the money lent. The claim was partially decreed by the Sub-Judge of Bara Banki, and that decree was affirmed on appeal by the District Judge of Lucknow. No further appeal was, as of right, open to the defendant, but he applied to the Judicial Commissioner to revise the case under the terms of s. 622 of the Civil Procedure Code of 1882, on various grounds set forth in his application. All the objections taken were overruled by the Judicial Commissioner, and are not now insisted upon. But the Judicial Commissioner took a new objection of his own, and held that the first Court had no jurisdiction to try the case. He said: "The Court of first instance had no jurisdiction to try this case, against the Court of Wards, because a manager, Ghazafar Ali Khan, having been appointed by the Collector, either in his general capacity or as Court of Wards, he was the proper person to be so sued on behalf of the lunatic, *vide* ss. 11 and 14, Act XXXV of 1858, or else the guardian of the lunatic's person, who was his mother, ought to have been so sued."

There seems to have been some confusion in the mind of the learned Judge between a "manager" and a "guardian." The Oudh Land Revenue Act (Act XVII of 1876) relied upon by him enacts (ss. 175 and 176): "All disqualified proprietors whose property is in charge of the Court of Wards shall sue and be sued by and in the name of their guardians, where guardians have been appointed: provided that no such suit shall be maintained or defended by any guardian without the sanction of the Court of Wards. If no such guardian has been appointed, the disqualified proprietors shall sue and be sued by and in the name of the Court of Wards." There is nothing said about a manager.

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The learned Judge puts the objection in the alternative by saying: "Or else the guardian of the lunatic's person, who was his mother, ought to have been so sued." But there was no evidence at all of the mother being the guardian of the lunatic's person. Their Lordships are now told by Mr. Branson, on behalf of the defendant, that in fact the wife of the lunatic—not the mother as the learned Judge supposed—was appointed guardian. **[734]** But this fact has never been put upon the record, and cannot therefore be accepted here. But even supposing that the wife was appointed guardian, and that she was guardian at the time the decree of the first Court was made, still the fact remains that the appellant had made party to the suit the Court of Wards, the authority which had the property of the lunatic under its control, and which would have to answer a decree if a decree were made. Even if the guardian were a party, it would not be the guardian who would have to satisfy the decree; the guardian would have to go to the Court of Wards and get the funds to pay with. It is not suggested that the suit was not fully tried out upon the merits, or that any other line of defence could have been raised if the guardian had been party to the suit. The ground, therefore, on which the Judicial Commissioner reversed the decrees of the lower Courts seems to have been of the very flimsiest character, even if it had good technical grounds to go upon, which it had not. Their Lordships will therefore recommend Her Majesty to reverse the Judicial Commissioner's decree, and to restore the decrees of the District Judge. The respondent must pay the costs of the application to the Judicial Commissioner to revise the case, and the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*
Solicitor for the respondent: *The Solicitor, India Office.*

C.B.

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22 C. 734.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

GYANUND ASRAM (*Opposite-party*) v. BEPIN MOHUN SEN (*Petitioner*).* [8th March, 1895].

Appeal—Civil Procedure Code (Act XIV of 1882), *ss.* 629, 586, 588 *and* 591—*Order granting a review in a suit of Small Cause Court nature valued at less than Rs.* 500.

In a suit of a nature cognizable by Small Cause Court and valued at less than Rs. 500, an order granting a review was passed by the appellate Court

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* Appeal from Order No. 195 of 1894, against the order of J. Knox Wight, Esq., District Judge of Hooghly, dated the 10th of March 1894.

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[735] without recording any reason for it. An appeal was preferred against that order to the High Court under s. 629 of the Code of Civil Procedure:

Held, that the order was bad, being in contravention of the provisions of s. 626 of the Code of Civil Procedure.

Held, also, upon the objection of the respondent that no appeal lay against the above order, that the appeal was permissible under s. 629, the provisions whereof are not controlled or superseded by s. 591 of the Code. Questions raised in an application for review are totally different from those raised in the suit; a review can only be granted on special grounds, and it may well be that, although an appeal is not allowed from the final decree in the suit, an appeal is allowable from an order granting a review, which could re-open the case after it had been disposed of.

[**Diss.**, 23 M. 496 (498); **F.**, 24 P.L.R. 1904 = 33 P. R. 1902; 21 Ind. Cas. 913.]

THIS appeal arose out of an order granting a review by the District Judge of Hooghly, dated the 10th March 1894. One Bepin Mohun Sen got a money decree for less than Rs. 500 against one Gyanund Asram in the Second Munsif's Court of Hooghly. On appeal the District Judge reversed the judgment of the Court of first instance on the 28th July 1893. On the 11th November, the said Bepin Mohun Sen applied for a review of the judgment of the District Judge. After various postponements, the 16th of March 1894 was fixed for the final hearing of the case. But, on the 10th March, the District Judge, without recording any reason, simply admitted the review. Against this order the opposite-party, Gyanund Asram, appealed to the High Court.

Babu *Nalini Ranjan Chatterjee* and Babu *Jasoda Nandan Pramanik*, for the appellant.

Babu *Umakali Mukerjee* and Babu *Srish Chunder Chowdhry*, for the respondent.

Babu *Srish Chunder Chowdhry* took a preliminary objection to the hearing of the appeal, on the ground that, as the suit was of a nature cognizable by a Small Cause Court, and valued at less than Rs. 500, no second appeal would lie under s. 586 of the Code of Civil Procedure. He also relied upon ss. 588 and 591 of the Code.

Babu *Nalini Ranjan Chatterjee*, for the appellant.—The order complained against is in violation of s. 626 of the Code, and therefore cannot stand. An appeal lies under s. 629 of the Code of Civil Procedure from an order passed by the appellate Court **[736]** admitting a review, upon the grounds stated in that section, although no second appeal will lie in a suit of a Small Cause Court nature valued at less than Rs. 500. Section 629 appears in the chapter on "Reviews" the proceedings in which are totally different from proceedings in a suit. Section 629 is clear that an appeal will lie from an order admitting a review upon the grounds specified therein. Notwithstanding the provisions of s. 586, it has been held that an appeal lies from an order remanding a case in a suit cognizable by a Court of Small Causes. See *Collector of Bijnor* v. *Jafar Ali Khan* (1), *Mahadev Narsingh* v. *Ragho Keshav* (2).

It has also been held that an appeal lies from an order granting a review in a Small Cause Court suit. See *Gulam Husen Mahamed* v. *Musa Miya Hamad Ali* (3).

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order granting a review of a judgment of the appellate Court under s. 629 of the Code of Civil Procedure.

(1) 3 A. 18. (2) 7 B. 292. (3) 8 B. 260.

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The suit was one of a nature cognizable by a Court of Small Causes, and the value of the subject-matter of it was below Rs. 500. The suit was tried by the Munsif in his ordinary jurisdiction. After the appeal had been disposed of, the defendant applied for a review of the appellate Court's judgment. This application was made on the 11th of November 1893. Notice issued upon the opposite side, and, after several adjournments, the 16th March 1894 was fixed for the hearing of the application. On the 10th March the review was allowed and a date fixed for the hearing of the arguments : by which we understand the arguments bearing on the appeal which was to be reheard. Obviously if the case on the 9th was adjourned till the 16th, but was disposed of on the 10th instant without notice to and in the absence of the opposite-party, the provisions of s. 626 of the Code were contravened, because no opportunity was granted to the opposite side to appear.

[737] There is an affidavit on the part of the respondent before us that, on the 9th, the Judge made a verbal order postponing the case till the 10th.

This affidavit is uncontradicted, and it would seem that the 16th, which was the date recorded, was written either by mistake or in ignorance of the verbal order.

But however this may be, the provisions of s. 626 have been clearly contravened in another respect. That section requires that the Judge shall record with his own hands his reasons for granting an application for review. In this case there is no such record, there is only a bare order, without any reasons, that the review is allowed. As the review was applied for on various grounds, such as the discovery of new evidence and the omission of the Court to consider and give due weight to some of the evidence which had been already given, it was important for the opposite side to know the exact grounds on which the application was granted.

We must hold, therefore, that the order being in contravention of s. 626, cannot stand.

A preliminary objection was taken by the respondent that no appeal lies against the order complained of, because s. 586 prohibits a second appeal in the suit; and because, also, the order is not one of those specified in s. 588, and that section and s. 591 prohibit an appeal from any order passed by a Court in the exercise of original or appellate jurisdiction other than those specified. Conceding this, it seems impossible to get over the language of s. 629, which provides that an objection to an order granting an application for review "may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order made in the suit." Section 623 contemplates applications for review of judgments in suits in which no appeal lies as well as in suits in which an appeal does lie. It may be that s. 629 would not give a right of appeal against the final decree in a suit in which an appeal was expressly prohibited by the other sections of the Code : but the person aggrieved would still have the alternative remedy given by that section of appealing against the order granting the application for review.

[738] The questions raised in applications for review are totally different from those raised in the suit. A review can only be granted on special grounds, and it may well be that, although an appeal is not allowed from the final decree in the suit, an appeal is allowed from an order granting a review which would reopen the case after it had been disposed of. That the provisions of s. 629 are not controlled or

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superseded by s. 591 appears from this that, in appealable cases, an appeal is certainly allowed from the order, although the order is not one of those specified in s. 588.

The order appealed against must be set aside; and the case sent back to the District Judge in order that he may hear and dispose of the application in the manner directed in Chap. XLVII of the Code of Civil Procedure.

S. C. G. *Case remanded.*

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22 C. 738.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

NOWNIT LAL (*Plaintiff*) *v.* RADHA KRISTO BHUTTACHARJEE AND OTHERS (*Defendants*).* [24th April, 1895.]

Sale for arrears of revenue—Suit to set aside sale—Act XI of 1859, *s* 5—*Attachment by order of Civil Court—Latest day of payment, Attachment subsequent to.*

In a suit to set aside the sale of an estate for arrears of revenue, one of the grounds taken by the plaintiff was that the estate, which was under attachment by an order of the Civil Court at the time of the sale, was sold without due observance of the formalities prescribed by s. 5, Act XI of 1859. The date fixed for payment of the arrears for which the estate was sold was 7th June 1890. The date of attachment was 2nd August following.

Held, that s. 5 of Act XI of 1859 provides for cases in which the attachment has been made at least fifteen days before the last date of payment for which it is sought to bring the estate to sale. That section would not therefore apply to a case like the present, in which the attachment was after the last day of payment and after the estate had become liable to sale for arrears of Government revenue. *Bunwari Lali Sahu* v. *Mohabir Persad Singh* (1) referred to.

[R., 31 C. 256 (259) (P.C.) = 8 C.W.N. 649.]

[739] PLAINTIFF sued to set aside the sale for arrears of revenue of Mouza Mohsimpur Kurtha and for other reliefs not necessary to mention in this report. The sale was for arrears of Government revenue due on the 7th June 1890, and was held on the 30th September 1890. In the meantime (2nd August 1890) there was an attachment by order of the Civil Court. One of the questions raised in this case therefore was, whether in consequence of the attachment the notification prescribed by s. 5 of Act XI of 1859 should have been made, and whether in the absence of such notification the sale could stand.

The plaintiff appealed to the High Court.

Mr. *T. Apcar*, Babu *Satis Chandra Ghose* and Babu *Makhun Lal*, for the appellant.

Mr. *Hill*, Babu *Taraknath Palit* and Babu *Debendra Chandra Mallik*, for the respondent.

Mr. *T. Apcar.*—Under s. 5 of Act XI of 1859, the property being under attachment by order of a judicial authority at the time of the sale, a notification should have been issued in accordance with that section. In this case there was no notification under s. 5, and the sale was *ultra vires* and void. See *Gobind Lal Roy* v. *Biprodas Roy* (2).

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* Appeal from Original Decree No. 372 of 1893, against the decree of Khajah Syed Mahomed Fukhruddin Hossein, Subordinate Judge of the third Court, Patna, dated 23rd of August 1893.

(1) 12 B.L.R. 297 = 1 I.A. 89. (2) 17 C. 398 = 21 C. 70.

Mr. *Hill*, for the respondent.—The attachment contemplated in s. 5 of Act XI of 1859 is an attachment remaining in force at the time when the arrears fell due. This is clear from s. 3 of the Act. The notification under s. 5 should be fifteen days before the latest day fixed for payment under s. 3, and it should, among other matters, notify the latest day of payment. That being so, it is clear that the Legislature intended that s. 5 should apply only to cases in which there was an attachment before the arrears fell due and not to cases of attachment at the time of the sale.

Mr. *T. Apcar* was heard in reply.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows :—

JUDGMENT.

The plaintiff was the proprietor of two estates being mouzahs Mohsimpur Kurtha and Kunchunrup. Apparently he has had some difficulty in the payment of Government revenue owing to [740] the default of his co-sharer. The properties fell into arrears in the payment of Government revenue due on the 7th June 1890, and were accordingly brought to sale. The plaintiff unsuccessfully petitioned both the Collector and the Commissioner to set aside the sale of mouzah Mohsimpur Kurtha, but he succeeded in his application to the Collector in regard to the sale of Kunchunrup, which was in another district, and the Collector of which was more favourably inclined towards him. It would seem that after the sale the plaintiff had a communication with the purchaser, Babu Radha Kristo Bhuttacharjee, a pleader of the Judge's Court at Patna, who had been his pleader for some years past, and in consequence of what the plaintiff maintains was the result of this communication, and a promise received from Babu Radha Kristo, he has brought the present suit to set aside the sale held on the 30th September 1890. He sues to set aside the sale on two grounds: *First*, that at the time when the sale was held, there was no arrear of Government revenue; and, *second*, that in consequence of an attachment by an order of the Civil Court then subsisting, the sale could not be held by reason of s. 5 of the Sale Law. The plaintiff also claims to recover the property as against the purchaser, Babu Radha Kristo Bhuttacharjee, on an agreement said to have been entered into with him, under which he undertook to reconvey the plaintiff's share in this property to him. The Subordinate Judge has held that the estate was properly brought to sale, as arrears of Government revenue claimed from the plaintiff were really due, and that the proceedings in regard to the sale were in accordance with the law, and he dismissed the suit as against Babu Radha Kristo Bhuttacharjee personally on the ground that, on the evidence, he could not hold that the contract was complete in regard to this transfer.

These three points are made the grounds of appeal before us.

In regard to the first point, it is sufficient to say that we entirely agree with the judgment of the Subordinate Judge which sets out clearly in what respect the arrears of Government revenue were due. It seems to us that any confusion which exists in regard to this matter is due to the attempt of the revenue authorities to assimilate the months in the Indian calendar with [741] those in the English calendar, with which they do not completely correspond. We are satisfied on the evidence before us that the estate was in arrear, and was, therefore, properly brought to sale.

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In regard to the second point, it is alleged that inasmuch as there was an attachment by an order of the Civil Court on the 2nd August 1890, the property could not be brought to sale without due observance of the formalities prescribed by s. 5 of the Act. Section 5 in our opinion does not apply to this case. The last day of payment of Government revenue was the 7th of June, and the attachment of the Civil Court was not made until the 2nd August following. Section 5 provides for cases in which the attachment has been made at least fifteen days before the last date of payment for which it is sought to bring the estate to sale. We may refer to the case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1) for the reason for this enactment, and the observations of their Lordships of the Judicial Committee clearly show that a case such as we have now before us does not fall within the scope of s. 5. The attachment having been made on the 2nd of August, it would be impossible to comply with the terms of s. 5 of the Act of 1859, which requires the Collector to give notice of that attachment fifteen days preceding the date for the payment of arrears. But the date fixed for the payment of these arrears was the 7th of June, sometime before the attachment. Section 5 would not therefore apply to a case like that now before us, in which the attachment was after the last day of payment and after the estate had become liable to sale for arrears of Government revenue.

In regard to the third point, we think that the Subordinate Judge has correctly held that the evidence as to the alleged contract between the plaintiff and Babu Radha Kristo Bhuttacharjee is extremely vague and inconclusive. The evidence of the plaintiff himself does not show that any agreement was arrived at, and no doubt it fails to show specifically what were the terms of any agreement contemplated. There is the evidence of other witnesses which is more to the point, but we think that in a matter of this description, the evidence of the principal is the [742] most material. So far, therefore, we agree with the Subordinate Judge. We may, however, observe, that, even taking it for the purposes of argument that the agreement was, as the evidence of the plaintiff's mookhtear states it to have been, that Babu Radha Kristo Bhuttacharjee agreed to reconvey to the plaintiff a half share in both these *mouzahs* on receipt from him of the amount paid at the sale, together with interest, the plaintiff has made it impossible for the defendant to comply with any such agreement. The plaintiff subsequently succeeded in getting set aside the sale of Mouzah Kunchunrup, in which he holds only a half share, and, therefore, what is said to have been contemplated, namely, that the two parties should each retain a half-share of Kunchunrup and half of the other mouzah Mohsimpur Kurtha, is no longer possible. We observe also that the plaintiff in his plaint does not even offer to pay to the defendant any money for the half share.

The appeal is, therefore, dismissed with costs.

S. C. C. *Appeal dismissed.*

(1) 12 B.L.R. 297 (300) = 1 I.A. 89 (104).

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Before Mr. Justice Beverley and Mr. Justice Hill.

NAFAR CHANDRA PAL CHOWDHURI AND OTHERS (*Plaintiffs, Petitioners for Review*) v. RAM LAL PAL (*Defendant, Opposite-party*).* [28th May, 1894.]

Landlord and tenant – Property in trees growing on land—Bengal Tenancy Act (VIII of 1885), s. 23—Right of occupancy tenant to cut down trees—Right of occupancy tenant to appropriate trees when cut down—Onus *of proof—Custom—Suit for damages.*

The property in trees growing on land is, by the general law, vested in the proprietor of the land, subject, of course, to any custom to the contrary.

Under s. 23 of the Bengal Tenancy Act, the *onus* is on the landlord to show that a tenant with occupancy right is debarred from cutting down the trees on the land, and not on the tenant to prove a custom giving him the right to do so. The right to appropriate them when cut down, however, is a different question.

In a suit by landlords against their tenants who had a right of occupancy for appropriating some mango trees growing on their land which they **[743]** had cut down: *Held*, that the *onus* was rightly thrown on the tenants of proving a custom they alleged, giving them the right to sell the trees, and, on failure to prove such custom, they were liable to damages for so appropriating them.

[**F.** 21 A. 297 = 19 A W.N. 72; 5 C.L.J. 413 (416); 6 C.L.J. 218 (222); **Rel.**, 4 N.L.R. 104 (110); 10 C.L J. 25; **Appl.**, 23 C. 854 (856); **R.**, 37 C. 322 (327) = 11 C.L.J. 209 = 14 C.W.N. 487 = 5 Ind. Cas. 243; **Cons.**, 23 C. 209 (210); **D.**, 24 M. 47 (**F.B.**).]

THE suits to which these rules relate were brought on the Small Cause Court side of the Court of the Subordinate Judge of Nuddea for damages for cutting down and appropriating some mango trees. The defendants were tenants with rights of occupancy of the land on which the trees stood, and they alleged that the trees had been planted by their ancestors and their produce had always been enjoyed by the defendants. The Subordinate Judge threw on the defendants the *onus* of proving that they were entitled to cut down and appropriate the trees, and, holding that they had failed to prove any custom which gave them such a right, held that they were not entitled to deal with the trees as they had done, and gave the plaintiff a decree in each suit: for Rs. 29 in one suit and Rs. 42 in the other. On the petition of the defendants rules were granted by the High Court to show cause why the judgment of the Subordinate Judge should not be set aside, on the ground that he had wrongly thrown the *onus* of proof on the defendants.

The rules came on for hearing before Beverley and Hill, JJ., who on 11th December 1893, delivered the following judgment:—

"We think that there can be no doubt that in this case the Subordinate Judge did throw the *onus* upon the defendants, and this has been practically admitted by the learned pleader who appears for the plaintiffs, who has argued that the *onus* was properly cast in this way. We think that this is not in accordance with s. 23 of the Bengal Tenancy Act, and that under that section the *onus* of proving the custom debarring a tenant from cutting down trees, is thrown on the plaintiff. We read the concluding words of that section as meaning that a *raiyat* with a right of occupancy may cut down the trees on his lands without the landlord's

* Civil Rule Nos. 1290 and 1291 of 1893, against the order of Babu Gopal Chundra Banerjee, Subordinate Judge of Small Cause Court, Nuddea, dated 9th June 1893.

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consent, unless there be a custom to the contrary ; and it is for the landlord to give some evidence of that custom. What evidence would be sufficient is, of course, for the Court trying the case to decide. We find that we are supported in this view of the law **[744]** by a judgment of a Division Bench of this Court, dated 19th of November 1889, in *Grija Nath Roy* v. *Mia Ulla Nasoya* (1). Under these circumstances we think that these rules must be made absolute, and the cases must be sent back to the Subordinate Judge to be retried with reference to these remarks. The petitioners will have their costs of these rules."

The plaintiffs applied for review of this judgment on the **[745]** following grounds: (1) that the Court should have held that s. 23 of the Bengal Tenancy Act has no application to a case like the present, in which the right to cut down trees was not claimed in respect of any use of the land ; (2) that assuming s. 23 to be applicable, the Court should have held on a proper construction of the concluding part of the section that the *onus* lies upon the tenant of proving a custom authorizing him to cut down trees ; (3) that the Court should have held that the defendants were not entitled to make out and succeed upon a case at variance with that stated in their petition and indirect opposition to that attempted to be made in the Court below, namely, that these tenants were by custom entitled to cut down and sell the trees under claim as being their property and not that of the plaintiffs ; and (4) that the Court should have held that the precedents, Rules 1068 and 1070 of 1889, cited, have no application to the facts of the present case, and that a *raiyat* with a

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22 C. 744-N.

(1) Civil Rules 1068 and 1070 of 1889 before TOTTENHAM and GHOSE, JJ.

Babu *Jasoda Nandan Pramanik*, for the plaintiffs.

Babu *Aushutosh Dhur*, for the defendants.

The facts are sufficiently stated in the judgment which was as follows :—

JUDGMENT.

These were rules obtained to show cause why the decrees of the Munsif of Nilphamari, sitting in the exercise of the Small Cause Court jurisdiction, by which the plaintiffs' suits were dismissed, should not be set aside.

The suits were brought against various tenants to recover damages for cutting down fruit trees standing upon their holdings. The plaints alleged that the trees had been so cut down by the tenants in contravention of the local custom. It seems to us clear, therefore, that the plaints were drawn with special reference to s. 23 of the Bengal Tenancy Act.

The defendants alleged that the trees belonged to them, and denied the plaintiffs' title therein.

The Munsif held that the plaintiffs having failed to prove their title to the trees, their suits must be dismissed, the trees having been proved to stand upon the defendants' ancestral lands.

Upon the hearing of the rules we have been referred by the petitioners' vakil to certain old decisions of this Court, and to a decision of the Privy Council, which we may here mention has no application to the facts of this case ; and also to a recent unreported decision passed upon a reference from a Small Cause Court by Mr. Justice Norris and Mr. Justice Macpherson. In that decision it was held that the *onus* rested upon the tenant to prove the custom to cut down a mango tree. We do not gather from the decision in that case what was the precise nature of the right held by the tenant and we observe that the defendant specifically set up a custom, and the landlord set up a counter-custom against the defendant. In the present case the landlord alone set up a custom prohibitory to cutting down trees. We think, with reference to the wording of s. 23 of the Bengal Tenancy Act, that the defendants as old occupancy *raiyats*, if not debarred by local custom, may cut down trees, and certainly no local custom seems to have been proved against them.

We think, therefore, that we are not in a postition to disturb the decrees of the Munsif, and these rules will be discharged with costs.

[F., 22 C. 742 ; Appl., 23 C. 854 (856).]

right of occupancy is not entitled to cut down trees without the consent of the zemindar, except when by custom allowed to do so. An additional ground was afterwards allowed to be filed, *viz.*, that the Court should have held that in the present case the claim and decree made being one for the value of trees, and there being no provision in s. 23 or other sections of the Bengal Tenancy Act as to who should appropriate the trees when cut down, the suit should not be disposed of without deciding that question.

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Mr. *J. T. Woodroffe*, Babu *Saroda Prosonno Roy* and Babu *Haro Prosad Chatterjee*, for the petitioner for review.

Dr. *Rash Behari Ghose* and Babu *Jasoda Nandan Pramanick*, for the opposite-party.

The arguments and cases cited are sufficiently referred to in the judgment of the High Court (BEVERLEY and HILL, JJ.) which was as follows:—

JUDGMENT.

HILL, J.—The question raised is whether the Subordinate Judge has properly awarded damages to the plaintiffs, who are zemindars, in respect of the conversion of certain mango trees which were cut down on their holdings and sold by the defendants, who are *raiyats* with rights of occupancy.

[746] The rules were obtained on the ground that, regard being had to the provisions of s. 23 of the Bengal Tenancy Act, the Subordinate Judge had improperly imposed on the defendants the burden of showing that they were entitled to cut down and appropriate the trees. Mr. Woodroffe, who appeared for the plaintiffs to show cause, contended, in answer, that, on the proper construction of the section, it lay primarily on the defendants to justify the felling of the trees as an act necessary for the purposes of the cultivation of the holdings, and that only when this had been established could the question arise whether they were precluded by custom from cutting them down. He further argued that, assuming both these questions to have been decided against the plaintiffs, there still remained the question whether the property in the trees was in the plaintiffs or in the defendants.

We do not feel called upon to deal with the first of these points. It was not raised in the Court below, and the damages awarded being confined to the value of the trees cut down, it is not, we consider, material to the decision of the question now before us. As to the second point, Mr. Woodroffe admits that the burden of proof lies on the landlord to establish a custom prohibiting the cutting down of trees by an occupancy tenant, and not on the tenant to establish the contrary. But this question is, likewise, for the latter of the reasons just stated, in our opinion, immaterial. We may, however, say that we are inclined to think that Mr. Woodroffe is correct in his admission. There are not, so far as we are aware, any reported decisions on the question, but two unreported cases in which the matter was dealt with were brought to our notice during the argument. They are, however, not in accord. The first was a Small Cause Court reference [*Pyari Lall Pal* v. *Narayan Mandal* (1)], No. 9A

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22 C. 746-N.

(1) The following case was referred by the Subordinate Judge of Dinajpur under s. 617 of the Civil Procedure Code for the opinion of the High Court :—

"This is an action brought by the plaintiffs (zemindars) for recovery of damages from the defendant (a tenant) who has cut a mango tree that stood on his *jotedari* land.

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of 1888, decided on the 18th May 1888, which [747] was disposed of by Norris and Macpherson, JJ. There it was held that the *onus* lay upon the tenant of showing that he was entitled by custom to cut down a mango tree. The other was [748] *Nafar Chandra Pal Chowdhry* v. *Hazari Nath Ghose* (1), a decision of O'Kinealy and Ameer Ali, JJ., of the 6th March

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Defendant denies liability for the claim, pleading the existence of a custom enabling occupancy tenants to cut trees with-[747]out the zemindar's consent. Defendant is presumably an occupancy tenant and relies on the provisions of s. 23 of the Bengal Tenancy Act. The first question that suggests itself for solution is that of *onus*; the question being whether the *onus* primarily rests on the plaintiff to make out a custom to the contrary, or on the defendant to prove the existence of the custom set up by him. Of course, if the 23rd section of the Bengal Tenancy Act be literally construed, it would follow that the Legislature warrants the presumption of the occupancy tenant's inherent right to cut trees, and renders it incumbent upon the zemindars to prove a custom to the contrary; but such a construction would be opposed to the previous case law on the same subject [see *Abdool Rohoman* v. *Dataram Bashee* (1)] and the formerly accepted theory of the landlord's dominion of the land; and therefore on the maxim *cessante ratione legis cessat ipsa lex*, such a construction should not be countenanced. At the same time it may be argued that the Legislature has not approved of that case law, but that it places more value on the tenants' labour in growing a tree than on the land wherefrom the tree gets its sap; and hence the enactment in s. 23 of the Bengal Tenancy Act. As however a garden would be unfit for tenancy if a tenant can, without the landlord's consent, denude it of its trees in the absence of a custom to the contrary, and as in that case two parts of the said 23rd section of the Act would be irreconcilable [see *Reg* v. *Bishop of Oxford* (2)] quoted by Wilson, J., in *Alangamonjori Dabee's* case (3), I feel disposed to hold that the intention of the Legislature is otherwise than what the defendant's pleader suggests. In short I am for placing the *onus* previously on the defendant to prove the existence of the custom set up by him. If so, it is doubtless that defendant has failed to discharge it, though it is equally beyond doubt that the evidence offered by the plaintiff is not very satisfactory. It must be expressed here that the decision of this case therefore depends on the solution of the question as to *onus*—a question that is not free from difficulty and is one of general importance.

"I propose, therefore, to submit the following point for the opinion of the Hon'ble Judges:—

"Whether the plaintiff zemindar shall first be called upon to prove the prevalence of a custom prohibiting the exercise by occupancy tenants of the rights of cutting trees without his consent.

"Contingent on the opinion of the Hon'ble Court on the above quoted question, I feel inclined to award to the plaintiffs by way of compensation [748] the admitted value of the tree Claim is, therefore, partially allowed. Defendant shall pay to the plaintiff Rs. 1-4, with proportionate costs, less the costs payable to the former for the dismissed portion of the claim."

Dr. *Guru Das Banerjee* and Babu *Jasoda Nandan Pramanick*, for the plaintiff.

No one appeared for the defendant.

The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows:—

We are of opinion that the *onus* rests upon the tenant to prove a custom to cut down the mango tree.

[This case is also distinguished in 22 C. 744 (746).]

22 C. 748-N.

(1) In this suit which was one brought to recover from the defendants, tenants of the plaintiff, damages for cutting down and appropriating a tree on the land they held under the plaintiffs, a rule was granted by the High Court on the application of the defendant to show cause why the following judgment of the Subordinate Judge of Krishnaghur, sitting as a Small Cause Court, should not be set aside:—

"The issues are whether defendants in this suit and in suit No. 191 of 1893 have permanent right in the lands of their holdings, and whether plaintiffs are entitled to recover the damages claimed in these two suits respectively from defendants?

"I find that the defendants in these two suits have no such permanent right in the lands of their holdings as to entitle them to cut trees from their land. I find that they have simply a right of occupancy in the lands of their holdings. They have attempted to prove that tenants like themselves have the right of cutting growing

(1) W.R. 1864, 367. (2) L.R. 4 Q.B.D. 261. (3) 8 C. 157.

1894 (Civil Rules 2015 and 2016 of 1893), which related to the [749] cutting down by the tenant of mango and other trees. The learned Judges there say: "The Subordinate Judge held that it lay upon the defendants to prove a custom of cutting down trees in their favour, and that is clearly wrong. Section 23 of the Tenancy Act says that tenants having a right of occupancy can cut down trees subject to two conditions: (i) that the tenant does not impair the value of the land by doing so; and (ii) that he is limited by any custom or usage in contravention of that right." The latter cases were in the result remitted to the lower Court for the decision of the question whether the trees when cut down belonged to the landlord. The decision of Norris and Macpherson, JJ., was not, so far as appears, cited in the argument before O'Kinealy and Ameer Ali, JJ., which is to be regretted. But the above passage affords at all events a strong affirmation of the view, which, as we have indicated, we should have felt disposed to adopt had it been necessary to decide the question.

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22 C. 742.

[750] It may, however, we think, be assumed in the present case, without affecting the decision of the Court below, that the plaintiffs have failed to discharge the burden which the law laid upon them of proving a prohibitory custom, and that for all that appears the defendants were within their rights when they cut down the trees. Yet, since the right to fell trees and the right to appropriate them when felled are distinct rights, the question upon which the case must turn still remains, namely, whether the property in the trees was in the plaintiffs or the defendants.

The law on this subject is, we think, correctly stated in the case of *Kenny* v. *Ameerooddeen Mundul* (1), the earliest of a series of cases to which

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fruit trees on their land by the custom of the village. I am of opinion that they ought to have proved the existence of the custom all over the *pergunnah*, or at least some greater number of villages around, or else it cannot be a good custom. Some of the witnesses of defendants have proved that some tenants, who have some permanent right in the lands, have sold the standing fruit trees and have appropriated the value; but I am of opinion that the defendants in these two suits have no permanent right in their lands, hence they cannot appropriate the value of the trees. I am of opinion that plaintiffs have failed to prove the defendants cutting all the trees alleged by them, as there is only one witness of the plaintiffs on the point, and I cannot rely upon his testimony, so I would pass decrees for plaintiffs for the value of one tree admitted by the defendants in each of the two cases. Hence a decree will be passed for plaintiffs for recovery of Rs. 6, and each party bear his own costs under the circumstances of the case."

[749] On the hearing of the rule,—

Babu *Jasoda Nandan Pramanick*, for the defendant in support of the Rule.

Mr. *Woodroffe*, Babu *Saroda Prosouno Roy*, Dr. *Rash Behari Ghose* and Babu *Hara Prosad Chatterjee* for the plaintiffs showed cause.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This was a rule granted to the defendant, calling upon the other side to show cause why the decision of the Subordinate Judge of Krishnaghur, acting under his Small Cause Court powers, should not be set aside.

The plaintiffs, the landlords, sued their tenant, the defendant, for damages on account of his having cut down a tree and appropriated it. The Subordinate Judge held that it lay upon the defendant to prove a custom of cutting down trees in their favour, and that is clearly wrong. Section 23 of the Tenancy Act says that tenants having a right of occupancy can cut down trees subject to two conditions: (i) that the tenant does not impair the value of the land by doing so; and (ii) that he is limited by any custom or usage in contravention of that right.

On the question of appropriation the further point was raised, namely, has the plaintiff shown that the trees when cut belonged to him. That question has not been decided, and we think that it must be decided before the suit can be finally disposed of.

The rule will be made absolute, and the case will be returned to the lower Court for disposal. The costs of this hearing will abide the result. [This case is also followed in 22 C. 740 (748).]

(1) Suth S.C.C. Ref. 14.

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we were referred, which was decided by the Sudder Court on the 15th April 1862. There it was said: "Ownership in such trees [mango trees], as well as timber generally, is in the proprietor of the land upon which they grow." In another case decided by the same Judge on the same day [*Shookada Soondery Dabia* v. *Surroop Shaik* (1), it was laid down that by the common law of the country timber trees, when once planted by the tenant, belong to the proprietor of the land. The same view was taken in the case of *Abdool Rahoman* v. *Dataram Bashee* (2) where the zemindar sued to be maintained in his rights as zemindar to fruit trees grown on the land by his *raiyat*, and the Court in decreeing his claim said: " Although the tenant has a right to enjoy all the benefits that the growing timbers may afford him during his occupancy, he has no power to cut them down and convert them to his own use." So, in the case of *Ruttonjee Eduljee Shet* v. *Collector of Thanna* (3), trees are said, by the Privy Council, to be part of the land on which they stand, and the right to cut them down and sell them is said to be incident to the proprietorship of the land. The decision of O'Kinealy and Ameer Ali, JJ., already referred to, affords a further recognition of the same rule. Several cases also of the Allahabad Court to the same effect were cited to us, *e.g.*, *Ram Baran Ram* v. *Salig Ram Singh* (4), where the question was **[751]** between landlord and occupancy tenant, and the Court said that trees acceded to the soil and passed to the landlord with the land. So, in *Kasim Mian* v. *Banda Husain* (5), it was laid down that the presumption of law and the general rule is that property in timber on an occupancy tenant's holding rests in the landlord; and see also *Deoki Nandan* v. *Dhian Singh* (6) and *Imdad Khatun* v. *Bhagirath* (7). No case of a contrary tendency was cited to us, nor are we aware of any such case; nor was it suggested that the common law, as declared in the cases to which reference has now been made, has been altered by legislation, so that it may, we think, be taken that, however the right of an occupancy tenant to cut down trees on his holding may have been affected by legislation, the property in the trees is still by the general law vested in the zemindar. His proprietary rights in this respect are, it is true (putting out of view the effect upon them of contract), subject to modification, (of which the unreported case of *Nuffer Chunder Ghose* v. *Nund Lal Gossyamy* (8),

(1) Suth S. C. C. Ref. 17. (2) W.R. (1864) 367.
(3) 11 M.I.A. 295=10 W.R. P.C. 13. (4) 2 A. 896.
(5) 5 A. 616. (6) 8 A. 467. (7) 10 A. 159.

22 C. 751 N.

(8) This was an appeal by the defendants from the decree of Babu Kedar Nath Mazumdar, Second Subordinate Judge of Hooghly, dated the 27th of August 1888, reversing the decree of Babu Bhugwan Chundra Chatterjee, Munsif of Serampore, dated the 31st of March 1887.

On the appeal,—

Babu *Nil Madhab Bose*, for the appellant.

Babu *Kishore Lall Gossami*, for the respondent.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.), which sufficiently states the facts, was delivered by

PETHERAM, C.J.—This is a suit which has been brought by certain zemindars against their tenants, who are the occupancy holders of land within the zemindari, to restrain them from cutting down trees and for damages for having cut them down.

There has been an enquiry as to what is the custom in this zemindari, and the finding is, that the zemindars have a right to recover a one-fourth share of the value of the trees cut down by *raiyats*, when the *raiyats* cut them without the consent or permission of the zemindar. That I understand to mean that the *raiyats* by the custom

[752] Special Appeal, 87 of 1889, decided by the Chief Justice and Banerjee, J., on the 27th February 1890, affords an example), or it may be to complete extinction by custom; but failing the proof of such a custom his right, as it formerly existed, seems to us to subsist unimpaired.

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In the present cases the plea was that the defendants were entitled by local custom to appropriate the trees when felled. But the Subordinate Judge has properly, we think, placed the burden of showing the existence of such a custom on the defendants, and has found that they have not established it. That finding was not questioned here, and is binding on the defendants, and the result is that the rules must be discharged with costs.

Rules discharged.

22 C. 752.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

SURENDRA NARAIN SINGH (*Plaintiff*) v. BHAI LAL THAKUR AND OTHERS (*Defendants*).* [9th April, 1895.]

Immoveable property—Hat, *Lease of—General Clauses Act* (*I of* 1868), *s.* 2, *cl.* 5—*Transfer of Property Act* (*IV of* 1882), *s.* 107—*Suit for rent, Decree for use and occupation in—Plaint, Amendment of—Civil Procedure Code* (*Act XIV of* 1882), *s.* 53.

A suit was brought for rent of a *hat* on the basis of a verbal settlement [753] for three years at an annual *jama* of Rs. 370. The defendants denied the settlement. The first Court found for the plaintiff; but, on appeal, an objection having been raised by the defendants that the verbal lease was illegal under the Transfer of Property Act, the suit was dismissed.

Held:—A *hat* is a benefit arising out of land, and, therefore, within the definition of immoveable property as given in s. 2, cl. 5 of the General Clauses Act (I of 1868). The lease of a *hat* comes within s. 107 of the Transfer of Property Act (IV of 1882), and can be effected only by a registered instrument.

Held, also, that a decree for use and occupation of the land by the defendants could not be granted in this case, as that would amount to an amendment raising issues of an entirely different character from those on which the trial

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in this zemindari have a right to cut down trees within their holding but that if they do so they must pay their zemindars one-fourth of the value of the trees so cut down. If that is the case, it must [752] follow that a *raiyat* has a right to cut down trees without anybody's consent, and consequently any injunction restraining them from doing so must be wrong, and so far as the learned Subordinate Judge has granted an injunction, his decree must be varied and this appeal must be allowed. Then he has not in this case allowed any damages, and there is a cross-objection by the plaintiffs on that ground. It is said here that the value of the trees cut down is Rs. 18, and that amount is not disputed, and it is admitted upon these findings of fact that the zemindars are entitled to a quarter share of that, so that they must have a judgment and decree for a quarter share of Rs. 18, which is Rs. 4-8. The judgment then of the learned Subordinate Judge will be varied in this way: that the plaintiffs' claim for an injunction will be dismissed, and, on the other hand, they will have judgment for Rs. 4-8, being the quarter share of the value of the timber which the defendants have cut down on this holding; but as the parties in this case seem to have mistaken their rights and to have overstated them all through, we think in the result that the fairest course we can take is to say that each party should pay his own costs all through.

[F., 22 C. 742 (748); R., 37 C. 322 (327) = 11 C.L.J. 209 = 14 C.W.N. 487 = 5 Ind. Cas. 243.]

* Appeal from Appellate Decree No. 1792 of 1893, against the decree of Babu Huro Gobindo Mookerjee, Additional Subordinate Judge of Bhaugulpore, dated the 13th of July 1893, reversing the decree of Babu Uma Churn Kar, Additional Munsif of Madhepura, dated the 27th March 1893.

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was held in the Courts below as a suit for rent, and necessitating a trial upon fresh evidence. Such an amandment could not be allowed under s. 53 of the Civil Procedure Code. *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (1), *Eshan Chunder Singh* v. *Shama Churn Bhutto* (2), and *Narainee Dossee* v. *Nurrohury Mohonto* (3), referred to.

[F., 27 C. 239 (241, 242); R., 4 Bur.L.T. 197=11 Ind. Cas. 863; 17 C.W.N. 311=17 Ind. Cas. 646; 6 Ind. Cas. 766=20 M.L.J. 555 (558)=7 M.L.T. 419; 2 P.R. 1905=129 P.L.R. 1904; 6 M.L.T. 255; D., 12 O.C. 183 (B)=3 Ind. Cas. 589.]

THE plaintiff as the owner of a 9-annas' share in a *hat* brought this suit on the following allegations :—

2. "That the defendants having obtained a verbal settlement of 16 annas of the *hat* in Jhakirika Patti Pargana Malohni Gopal from 1294 to 1297, on an annual *jama* of Rs. 370, promising to pay the rent in Bhadro of each year, remained in joint possession thereof.

3. "That the plaintiff's 9-anna share was separated in 1296.

4. "That the defendants, being in collusion with the 7-anna shareholder, have not paid the rent, the plaintiff is, therefore, entitled to damages at Rs. 25 per cent. against the defendants."

The plaintiff then prayed for his share of the rent with cesses and damages amounting to Rs. 536-9 for 1296 and 1297.

The defendants denied the verbal settlement, and stated that they had been appointed by the plaintiff's co-sharer to collect rent on his behalf, and they only collected the rents which they remitted to him. The defendants also stated that the annual income of the *hat* for the whole 16-annas was only Rs. 100.

The issues raised were, "(1) whether plaintiff can sue alone? **[754]** (2) whether plaintiff is entitled to recover from the defendants, first party, the amount in claim?" The co-sharer (owner of the 7-annas share) was made defendant, second party, by an order of Court.

The Munsif, who first tried the case, decided both the issues in favour of the plaintiff. His finding on the evidence was that the defendants were *ticcadars* holding the *hat* for Rs. 370 for the 16-annas' share during the period in claim. On appeal, the defendants raised the objection that the verbal lease alleged by the plaintiff was illegal under the provisions of s. 107 of the Transfer of Property Act, and that the plaintiff could not have any rent on the strength of that lease. The Subordinate Judge allowed the objection and dismissed the suit.

The plaintiff preferred a second appeal to the High Court.

Babu *Sarada Charan Mitra*, for the appellant.—The lease in question was not a lease of immoveable property. It conferred only the right to collect certain dues known as *sayer* compensation. That is not of the nature of rent. *Surendro Prosad Bhuttacharji* v. *Kedar Nath Bhuttacharji* (4). The landlord retains possession of the land, and the dues levied are not on immoveable property within the definition of the General Clauses Act, and the lease does not fall within the terms of s. 107 of the Transfer of Property Act; but, assuming that the lease was void under that section, the plaintiff would be entitled to compensation for use and occupation. A void lease does not make the tenant a trespasser. Oral evidence may be admitted as to what the rent paid was, and that was the proper compensation in this case. Under such circumstances the tenant may be treated as tenant from year to year. *Walsh* v. *Lonsdale* (5); Woodfall's Law of Landlord and Tenant, 14th edition, pp. 102 and 570.

(1) 13 B.L.R. 243=21 W.R. 208. (2) 11 M.I.A. 20.
(3) Marshall 70. (4) 19 C. 8. (5) L. R., 21 Ch. D. 9.

Babu *Jogesh Chandra Dey*, for the respondents.—The interest leased is a benefit arising out of land, and it comes within the definition of immoveable property as given in the General Clauses Act, s. 2. Section 107 of the Transfer of Property Act clearly applies to this case. Then there is nothing to show that [755] the *hat* in question existed in 1793, and the case of *Bungshodhur Biswas* v. *Mudhoo Mohuldar* (1) applied to it. On the question of conversion of this suit into one for use and occupation a Full Bench of this Court ruled in the case of *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddin Lusker* (2), that such conversion could not be allowed.

Babu *Sarada Charan Mitra* was heard in reply.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows :—

JUDGMENT.

Plaintiff, as proprietor of a share, claimed rent, under a verbal agreement, for a *hat* from defendants, his co-sharer being made a defendant by order of the Court, and the Munsif gave him a decree. On appeal the suit was dismissed by the Subordinate Judge on the ground that a "*hat*" being immoveable property, and the lease being for more than one year, no verbal agreement could be proved; hence it could, under s. 107 of the Transfer of Property Act, be effected only by a registered instrument.

In second appeal plaintiff contends that a *hat* is not immoveable property, and that consequently s. 107 of the Transfer of Property Act does not apply. But a *hat* is a benefit arising out of land, and therefore within the definition of immoveable property as given in s. 2, cl. (5) of the General Clauses Act, and consequently the lease of a "*hat*" comes within s. 107 of the Transfer of Property Act, and can be effected only by a registered instrument.

Plaintiff, appellant, however, contends in the alternative, that, if this view of the law be adopted, he should obtain a decree for use and occupation, as admittedly the defendants are found to be in possession of the *hat* of which he is the part-proprietor. That would amount to an amendment of his plaint. The question, therefore, arises, whether this is permissible, and specially in the present stage of the proceedings, that is, in second appeal, when the suit has been tried in two Courts as originally brought as a suit for rent upon an alleged contract. The matter for our consideration, in the first instance, is whether this would be an [756] amendment so as to convert a suit of one character into a suit of another and inconsistent character (s. 53, Code of Civil Procedure).

The leading case on the subject is *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (2), which was decided by a Full Bench of this Court, in which it was held that in a suit for rent the plaintiff landlord was not entitled to have a further trial of the question, whether any, and, if so, what amount of rent is due on account of use and occupation of the land by the defendant. The amount due in the case before us, whether for use and occupation, or for rent, is not admitted. The defendant admits being in receipt of the collections from this *hat*, but he denies that he was under any lease, and he says that he acted merely as *tehsildar* for the proprietors. He also denies that any money is due from him on that account. The suit, therefore, if tried as one for use and occupation, would raise issues of an entirely different character from those on which the

(1) 21 W. R. 383. (2) 13 B.L R. 243.=21 W.R. 208.

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trial as a suit for rent has been held, and would necessitate a new trial of the case by the lower Court upon fresh evidence. See, in this connection, *Eshan Chunder Singh* v. *Shama Churn Bhutto* (1) and *Narainee Dossee* v. *Nurrohurry Mohonto* (2).

We, therefore, feel bound to refuse to allow such amendment of the claim. It is, we think, at all times undesirable to allow such amendment in second appeal, when the plaintiff has in two Courts never contemplated it, and has even gone so far as to persistently maintain his case as originally brought.

The appeal is, therefore, dismissed with costs.

S.C.C. *Appeal dismissed.*

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22 C. 757.

[757] CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

HIRA LAL SIRCAR AND OTHERS (*Petitioners*) *v.* QUEEN-EMPRESS (*Opposite Party*).* [10th May, 1895.]

Stamp Act (I of 1879), *Offence under—Acknowledgment of debts in writing—Attestation by witnesses—Bonds—Stamp Act* (*I of* 1879), *s.* 3, *cl.* 4 (*b*), *sch.* 1, *art.* 1 *and s.* 61.

Documents which are in form acknowledgments only are not converted into bonds, as defined in s. 3, cl. 4 (*b*) of the Stamp Act (I of 1879), merely because they contain memoranda as to the rate of interest at which the loan is made and are attested by witnesses. No document can be a bond within the above section, unless it is one which by itself creates an obligation to pay the money.

[F., 14 Bur.L.R. 287=4 L.B.R. 330; R., 35 P.R. 1903=101 P.L.R. 1903; D., 10 C.P.L.R. 1 (5).]

IN this case some of the accused, who were money-lenders, were convicted by the Deputy Magistrate of Beerbhoom under s. 61 of the Stamp Act and s. 109 of the Penal Code, and the others who were their debtors were convicted under s. 61 of the Stamp Act. The former used to lend money to the latter, and the transactions were entered in the account books of the money-lenders, and the entries attested by one or more witnesses. A form of one of such entries is given in the judgment of the High Court.

Babu *Karuna Sindhu Mukerjee*, appeared on behalf of the petitioners in support of the rule.

No one appeared to show cause.

Babu *Karuna Sindhu Mukerjee.*—The question arises whether these entries in the account books, because they are attested by witnesses, come within the definition of " bond " as given in s. 3, cl. 4 (*b*) of the Stamp Act. The form of the entries and the purpose for which they were made clearly show that they were mere acknowledgments of debts due, as contemplated in sch. I, cl. 1 of the Stamp Act. Mere attestation by witnesses does not make them bonds. By themselves they do not create any obligation to [758] pay any money. See *Binja Ram* v. *Raj Mohun*

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* Criminal Rule No. 201 of 1895, against the order passed by G. Gordon, Esq., Sessions Judge of Beerbhoom, dated the 26th March 1895, confirming the order passed by Babu Atal Behari Maitra, Deputy Magistrate of Beerbhoom, dated the 9th of January 1895.

(1) 11 M.I.A. 7 (20). (2) Marshall 70.

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Roy (1), and *Chowksi Himutlal* v. *Chowksi Achrutlal* (2). Then there was no intention of evading payment of the proper stamp duty, nor was any opportunity given to the accused for paying the duty and penalty. See ss. 37 and 40 of the Stamp Act, and *Empress* v. *Janki* (3) and *Queen-Empress* v. *Soddanund Mahanty* (4).

The judgment of the High Court (PETHERAM, C. J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

Several questions have been raised in this case, among them being the question whether certian documents are properly stamped. If that question is answered in favour of the accused persons, it will not be necessary to consider the others.

The documents in question are written in the account books of a firm of bankers or money-lenders, and are in the following form:—

One anna Stamp.
SRI NIMAI CHANDRA BISWAS
of Puranagram
Rs. Seventy only.

"Account of Sri Nimai Chandra Biswas of Puranagram.

Payments:

Witnesses:

Sri Hem Chandra Mukhopadhya of Bajitpur (writer), Sri Kisori Mohan Ghose of Harisara."

Amounts due:

Advance, 19th Assin 1301, through self in cash Rs. 75-0. Rupees seventy-five is taken by me as loan. I shall pay interest on it at the rate of Re. 1-0 one per cent per mensen.

The question is whether these writings are bonds within the meaning of s. 3, sub-s. 4, cl. (*b*) of the Stamp Act, or acknowledgments of debts within the meaning of sch. 1, art. 1 of the same Act.

[759] We are very clearly of opinion that they are not bonds, but acknowledgments only, and are therefore sufficiently stamped with one-anna stamps. The definition of a bond which is relied on is: "Any instrument attested by a witness, and not payable to order or bearer, whereby a person obliges himself to pay money to another." The important word in this definition is the word "obliges," and no document can be a bond within it unless it is one which itself creates an obligation to pay money, as is the case with those documents which are known as bonds according to the common use of the word, but is not the case with acknowledgments of advances, or of the purchase and receipt of goods, the obligation to pay for which is not created by the instrument, but arises from the promises to repay advances and to pay for goods, which the law always implies when money is borrowed or goods are purchased.

(1) 8 C. 282. (2) 8 B. 194. (3) 7 B. 82. (4) 8 C. 259.

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The present documents are, in form, acknowledgments only, and we do not think the mere fact that they contain memorandums as to the rate of interest at which the loan is made, and are attested by witnesses; is sufficient to convert what is otherwise a mere acknowledgment into a bond, which itself creates an obligation to pay the money.

The convictions and sentences must be set aside, and the fines, if paid, must be refunded.

S. C. B. *Conviction set aside.*

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22 C. 759.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Beverley.

SHEO PROGASH TEWARI (*Petitioner*) *v.* BHOOP NARAIN PROSAD PATHAK AND ANOTHER (*Opposite Parties*).*
[14th March, 1895.]

Penal Code (*Act XLV of* 1860), *ss.* 21 *and* 186—*Escape from arrest—Nazir's power of delegation—Public servant.*

A Nazir has authority to delegate the execution of warrants of arrest. *Dharam Chand Pal* v. *Queen-Empress* (1) followed.

[760] A peon acting under such delegation is a public servant within the meaning of the definition in s. 21, cl. 4 of the Penal Code.

Quære, whether the escape of a prisoner from arrest is an obstruction of a public servant within the meaning of s. 186 of the Penal Code.

Two warrants of arrest were issued by the Munsif of Buxar against the petitioner in execution of two decrees against him. The warrants were addressed to the Nazir of the Court, who delegated its execution to two peons who arrested the petitioner; and while they were bringing him towards the Court, he called for help, and four persons came and rescued him from the custody of the peons. The Munsif ordered the prosecution of the petitioner and the four other persons "for offences under ss. 186 and 225 of the Penal Code, and also for abetting the same, or under any other section which might apply to their case." There was an appeal to the Sessions Judge, who dismissed the appeal, holding that under s. 195 of the Code of Criminal Procedure he had no authority to interfere, because the order of the Munsif was under s. 476 of the Code of Criminal Procedure. The petitioner alone moved the High Court and obtained a rule.

Babu *Dwarka Nath Chakrabarti* appeared on behalf of the petitioner in support of the rule.

Babu *Debendro Chundra Mullick* appeared to show cause.

Babu *Dwarka Nath Chakrabarti.*—The petitioner committed no offence at all either under s. 186 or s. 225 of the Penal Code. Section 225 has no application so far as the petitioner is concerned. The language used in s. 186 does not apply to a person escaping from custody. See *Reg.* v. *Poshubin Dhambaji Patil* (2) [PETHERAM, C. J.—Were not the peons public servants under s. 21, cl. 4, of the Penal Code?] But they were not acting in the discharge of their public functions. The warrants were addressed to the Nazir, and he had no authority to delegate their

* Criminal Revision No. 46 of 1895, against the order passed by G. G. Dey, Esq., District Judge of Shahabad, dated the 29th of December 1894, affirming the order of Babu Nandulal Dey, Munsif of Buxar, dated the 31st of July 1894.

(1) 22 C. 596. (2) 2 B.H.C. 134.

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execution to the peons. [BEVERLEY, J.—That point has been decided in the case of *Dharam Chand Lal* v. *Queen-Empress* (1).] But there is a substantial difference between sections relating to attachment of property and those relating to arrest of the person. In s. 269 of the Civil Procedure Code which deals with attachment [761] of moveable property the words used are "the attaching officer" and "one of his subordinates," and so in s. 271 the words "person executing the process" have been used; but in ss. 336 and 337 dealing with the arrest of persons the words "the officer *authorized* to make the arrest" and "the officer *entrusted* with its execution," respectively, have been made use of. See also Form No. 154 in sch. 4 of the Code. There the words are "these are to command *you* to arrest."

Babu *Debendro Chundra Mullick* in showing cause relied upon the case of *Abdul Karim* v. *Bullen* (2).

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

We are of opinion that this case cannot be distinguished from the case of *Dharam Chand Lal* v. *Queen-Empress* (1) decided by a Bench of this Court on the 6th instant, and this rule must, therefore, be discharged.

The point whether the escape of a prisoner from arrest is or is not an obstruction of a public servant within the meaning of s. 186 of the Penal Code does not arise in this case, as it was proved that the petitioner being present abetted four other persons in obstructing a public servant.

We may refer to the case of *Queen* v. *Bhagai Dafadar* (3) as showing that a peon of a Court of Justice, whose duty it is to execute any judicial process, is a public servant within the meaning of the definition in s. 21 of the Penal Code, cl. 4.

S. C. B. *Rule discharged.*

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22 C. 761.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

QUEEN-EMPRESS *v.* MAHALABUDDIN AND OTHERS (*Petitioners*).*
[8th May, 1895.]

Criminal Procedure Code (Act X of 1882), *s.* 523—*Seizure of property on suspicion—Order by the Magistrate.*

By the provisions of s. 523 of the Code of Criminal Procedure it is [762] not intended that any final steps should be taken by the Magistrate, nor is he bound to take any final steps, to ascertain whether the property seized on suspicion belongs to the person in whose possession it was found, until after the expiry of the six months mentioned in the section; but when the proclamation has been issued, and the six months have expired, then, under the provisions of s. 524, the person in whose possession the property was found can come forward and show that it is his own.

[Cited, 3 L.B.R. 197 (198).]

ON the 2nd of March 1895 the Sub-Inspector of Police at Contai made a report to the Deputy Magistrate that he had, on suspicion that

* Criminal Rules Nos. 194 and 195 of 1895, against the order passed by Babu Jagabandhu Bhuttacharjee, Sub-Divisional Magistrate of Contai, dated the 25th of March 1895.

(1) 22 C. 596. (2) 6 A. 385. (3) 2 B.L.R. F.B. 21.

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they were stolen property, seized certain ornaments found in the house of the petitioners. Acting upon this report, the Deputy Magistrate, on the 7th of March, issued notices on the petitioners, directing them to appear before him and to satisfy him that the ornaments were not stolen property. On the 19th of March the petitioners applied for summonses upon certain witnesses on their behalf, but as there was great delay in making the application the Magistrate refused it. On the 25th of March the Deputy Magistrate examined four witnesses, and was satisfied that the ornaments found in the houses of the petitioners did not belong to them, and held, under the provisions of s. 523 of the Code of Criminal Procedure, that they were not entitled to their possession, and directed that the proclamation referred to in the above section be duly published. The petitioners moved the High Court and obtained rules against the order of the Deputy Magistrate.

Mr. *Barrow* and Dr. *Ashutosh Mukerjee* appeared in support of the rules in case No. 195.

No one appeared to show cause against the rules; but the Deputy Magistrate submitted an explanation, stating it was not necessary to record evidence before passing an order under s. 523 of the Criminal Procedure Code, and further pointing out that, if his order was set aside, it would interfere with the peace of the district, as the local zemindars were notoriously receivers of stolen property.

Mr. *Barrow*.—Under s. 523 of the Criminal Procedure Code the Magistrate, who is directed to "make such order as he thinks fit respecting the delivery of the property" seized on suspicion, can only do so after giving the persons, in whose **[763]** possession it was when seized, an opportunity of being heard and adducing evidence. The section says that if the persons entitled to possession "cannot be ascertained," then the Magistrate is to pass certain orders. The words "cannot be ascertained" indicate an enquiry by the Magistrate, and at that enquiry the persons whose property is seized on suspicion have a right to be heard and to adduce evidence. An order dealing with the possession of property which is presumably mine ought not in common fairness to be made behind my back.

The following judgment was delivered by the Court (PETHERAM, C.J., and BEVERLEY, J.) :—

JUDGMENT.

We think that in this case the rule must be discharged. The question is a very simple question of law, and is, whether a Magistrate, to whom a seizure of property by the Police has been reported, under s. 523 of the Code of Criminal Procedure, as property which they suspect to have been stolen, is justified in detaining the property and issuing a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim to appear before him and establish his claim within six months from the date of such proclamation, until he has first called upon the person in whose possession the property was when it was seized to show cause why this should not be done.

The case has been argued before us by Mr. Barrow for the petitioners, but we think that he failed to show anything on the face of these sections which imposes any such obligation on the Magistrate. The duty of the Magistrate, when the matter is reported to him, is to deliver over the property to the person entitled to the possession of it, if there is no doubt about such property belonging to him; but if there is any doubt about it,

he is to detain it and issue a proclamation to ascertain whether or not there are any claimants to the property; and it is clear to us that it is not intended that any final steps should be taken by the Magistrate, or that he is bound to take any final steps, to ascertain whether the property belongs to the person in whose possession it was found, until after the expiry of the six months, but when the proclamation has been issued and the six [764] months have expired, then the provisions of s. 524 come in, and the person in whose possession it was found can come forward and show that it is his own. We cannot say that the Magistrate has in any way exceeded his powers, and, therefore, these two rules must be discharged.

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S. C. B. *Rules discharged.*

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22 C. 764.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

DEBI DIAL SAHU (*Decree-holder*) v. MOHARAJ SINGH (*Judgment-debtor*).* [6th May, 1895.]

Execution of decree—Transfer of decree for execution—Civil Procedure Code (Act XIV of 1882), ss. 223, 226—Execution of decree passed in another district—Jurisdiction.

On the application of the decree-holder, a decree for money passed by a Munsif in one district was sent for execution to the Court of a Munsif in another district, and not to the District Court as provided for in s. 223 of the Civil Procedure Code: *Held*, that the Munsif's Court to which the decree was sent for execution had no jurisdiction to execute it without an express order of the District Judge under s. 226.

THE appellant obtained a decree for rent in the Munsif's Court at Daltongunj in the district of Palamow, and applied to that Court for transmission of the decree for execution in the Court of the Munsif of Aurungabad in the district of Gya. The application was granted and the decree was sent for execution directly to the Court of the Munsif at Aurungabad. The appellant then applied for execution of his decree in the latter Court. One of the objections raised by the judgment-debtor was that the application could not be granted, as the decree "did not come to the Court of Aurungabad through the proper channel."

The last paragraph of s. 223 of the Code of Civil Procedure enacts :—

[765] "If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed the decree, such Court shall send the same directly to the former Court. But if the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed."

The Munsif at Aurungabad allowed the execution; but, on appeal, the District Judge of Gya set aside his proceedings as *ultra vires*.

The decree-holder appealed to the High Court.

Moulvie *Mahomed Habibulla* for the appellant contended that the omission to pass the decree through the channel of the District Court was a mere informality not affecting the jurisdiction of the Aurungabad Court. The District Judge had only to pass a formal order to send down

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* Appeal from Appellate Order No. 129 of 1894, against the order of A. C. Brett, Esq., District Judge of Gya, dated the 29th January 1894, reversing the order of Babu Suresh Chunder Banerjee, Munsif of Arrah, dated the 12th of July 1893.

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the papers to Aurungabad. The Munsif's order was not *ultra vires* on account of such a defect as this.

Babu *Mohabir Sahai*, for the respondent.—Section 223 begins by providing for execution of a decree in the Court to which it is sent for execution *under the provisions hereinafter contained.* Reading this part of the section with the words "shall send it to the District Court" in the end of that section, it is clear that the procedure of transmission to the District Judge was an important one, and that the law meant it to be strictly followed. The object is made clear by s. 226, which authorizes the District Court, either to execute the decree itself, or to authorize a subordinate Court to do so. The Munsif at Daltongunj had no authority to send the decree to the Munsif at Aurungabad, and the latter Court had not been authorized by the District Court of Gya to proceed with the execution.

Moulvie *Habibulla* was heard in reply.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows :—

JUDGMENT.

The decree in this case was passed by the Munsif of Daltongunj for money. An application was made by the decree-holder to have it sent for execution by the Munsif of Aurungabad by sale of [766] immoveable properties within the jurisdiction of that Court. The Munsif of Daltongunj, in disregard of the last clause of s. 223 of the Code of Civil Procedure, sent this decree for execution direct to the Munsif of Aurungabad, instead of through the District Court of Gya. An objection was at once made by the judgment-debtor that, inasmuch as the authority of the District Court of Gya was wanting, the Munsif of Aurungabad was without jurisdiction. The Munsif disallowed this objection; but the District Judge on appeal held that it was fatal, and he accordingly disallowed the proceedings in execution. The decree-holder has appealed.

This point is not free from difficulty, for it involves the determination of, whether this was only an irregularity, or a matter affecting the jurisdiction of the Court of Aurungabad. After much consideration, however, we have come to the conclusion that the Munsif of Aurungabad had no jurisdiction without an express order of the District Judge passed under s. 226. The intention of the Legislature as expressed in s. 226 seems to have been to give the Court of the District in which it was desired to execute a decree which was passed by the Court of another Distict supreme authority in regard to the execution of that decree, and to provide that it is only by an order passed by the District Court that any subordinate Court in that district is empowered to proceed in such a matter. S. 226 directs that, after receipt of the necessary papers from the Court which passed the decree, the decree or order may, if the Court to which it is sent be the District Court, be executed by such Court or by any subordinate Court which it directs to execute the same. The District Court, no doubt, has jurisdiction over the entire District, and the Judge, therefore, has the option given to him of executing the decree himself, or, if he so thinks fit, of directing any subordinate Court to execute the same. Until such an order has been passed, we are of opinion that no subordinate Court has jurisdiction to execute such a decree. The appeal is, therefore, dismissed with costs.

S. C. C. *Appeal dismissed.*

22 C. 767 (F.B.).

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[767] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Norris, Mr. Justice Pigot, Mr. Justice Macpherson, Mr. Justice Ghose, Mr. Justice Beverley, Mr. Justice Banerjee, Mr. Justice Hill, Mr. Justice Gordon, Mr. Justice Sale, and Mr. Justice Stevens.

JOGODANUND SINGH (*Decree-holder*) *v.* AMRITA LAL SIRCAR AND OTHERS (*Judgment-debtors*) AND OTHERS (*Auction-purchasers*).*
[30th April, 1895.]

Civil Procedure Code (Act XIV of 1882), s. 310 *A—Civil Procedure Code Amendment Act (V of* 1894)*—Construction of Statute—Effect of Act not creating new rights—Execution of decree—Sale in execution of decree held after Act V of* 1894 *came into operation, the execution proceedings being commenced before General Clauses Consolidation Act (I of* 1868)*—Bengal Tenancy Act (VIII of* 1885), s. 174*—Civil Procedure Code (Act XIV of* 1882), *s.* 622.

On the 8th February 1894, a decree was obtained against *A* and others in the Small Cause Court of Calcutta, and was subsequently transferred to one *J*, who was substituted in the place of the original decree-holder. On 26th July *J* applied in the Small Cause Court for execution of the decree, and on the same date the decree was transferred for execution to the District Court of Bankura. On the 3rd August a writ of attachment issued, and on the 5th it was served. Sale proclamation issued on the 11th and was served on the 14th August, and on the 20th September the sale took place. On the 27th September 1894, the judgment-debtor applied, under s. 310A of the Code of Civil Procedure, which section became part of the Code under the provisions of Act V of 1894, passed on the 2nd March 1894, to have the sale set aside. The District Judge, relying upon the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (1), together with the principle enunciated in the cases of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2) and *Uzir Ali* v. *Ram Komal Shaha* (3), refused to set it aside, on the ground that s. 310-A was not a mere matter of procedure, and Act V of 1894 had no retrospective effect, and therefore s. 310A was not applicable to proceedings in execution of a decree which had been passed [768] before that section came into operation. In an application under s. 622 of the Civil Procedure Code to set aside this decision as wrong:

Held by the Full Court that the decision in *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2), so far as it holds that s. 174 of the Bengal Tenancy Act creates a new right in a judgment-debtor, and is therefore inapplicable to a case in which the decree was passed before that Act became law, is wrong. The cases of *Uzir Ali* v. *Ram Komul Shaha* (3) and *Girish Chundra Basu* v. *Apurba Krishna Dass* (1), which are based upon the same principle, are also wrongly decided.

Quære.—Whether the decision in *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2) was correct under s. 6 of the General Clauses Act by reason of the execution proceedings having been commenced under Bengal Act VIII of 1869, an Act repealed by the Bengal Tenancy Act? That question did not arise in the present case, for though the execution proceedings were instituted under the old law the case is unaffected by s. 6 of the General Clauses Act, as the change in the law was brought about, not by the repeal of the old Act, but by the addition to it of a new s. 310A.

Held, therefore, that s. 310-A was applicable to the proceedings in execution in the present case, and in that view the Court below was bound, upon the application of the judgment-debtor, to set aside the sale, and not having done so, it had failed to exercise jurisdiction within the meaning of s. 622 of the Code. The Court had power therefore to interfere under that section.

[F., 25 C. 155 (158); 29 C. 33 (35); 1 C.W.N. 652 (664); 6 C.W.N. 57 (60); 13 Ind. Cas. 264 (266) = 5 S.L.R. 184; R., 23 B. 450 (453); 23 C. 682 (684); 33 C. 487 = 3 C.L.J. 293; 12 C.L.J. 1 (5) = 14 C.W.N. 788 = 6 Ind. Cas. 193; 17 C.L.J.

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* Full Bench Reference on Rule No. 2162 of 1894, against an order of G. Gordon, Esq., Officiating District Judge of Bankura, dated the 12th November 1894.

(1) 11 C. 940. (2) 14 C. 636. (3) 15 C. 383.

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317 (339) = 17 C.W.N. 889 (906) = 19 Ind. Cas. 793 (801); 1 C.W.N. 617 (624); 17 C.W.N. 619 = 15 Ind. Cas. 479; 6 Ind. Cas. 1015 (1016) = 13 O.C. 152; 23 Ind. Cas. 981 = 18 C.W.N. 1016; D., 9 Ind. Cas. 619.]

THE facts of the case appear sufficiently from the order of reference of Pigot and Rampini, JJ., which was as follows:—

"This is a rule granted on the 6th December 1894 by Prinsep and Ghose, JJ., under s. 622 of the Civil Procedure Code in the matter of Execution case No. 30 of 1894, in the Court of the District Judge of Bankura, in which Jogodanund Singh is the decree-holder and Amrita Lal Sircar and others are the judgment-debtors.

"The rule is obtained by the judgment-debtor, Amrita Lal Sircar. It calls upon the decree-holder and Charles William Wallace and others, auction-purchasers at a sale held in these execution-proceedings on the 20th September 1894, to show cause why an order of the District Judge of Bankura made on the 12th November 1894, refusing the application of the said judgment-debtor to set aside the said execution sale and confirming such sale, should not be set aside.

[769] "The facts of the case are as follows: On February 8th, 1894, Jettmul Gopi Kissen obtained a decree against Amrita Lal Sircar (the petitioner) and others in the Small Cause Court of Calcutta in suit No. 1579 of 1894. The decree was subsequently transferred to the present decree-holder, Jogodanund Singh, who was substituted as the decree-holder in the place of the said Jettmul Gopi Kissen. On the 26th July 1894, the decree-holder, Jogodanund, applied in the Small Cause Court for execution of the decree, and on the same date the decree was transferred to the District Court of Bankura for execution. On August 1st, 1894, application for execution was made in the Bankura Court, and the execution case was numbered No. 30 of 1894. On August 3rd a writ of attachment issued, and on the 5th it was served. Sale proclamation issued on the 11th and was served on the 14th August; and on the 20th September the sale took place. On the 27th September 1894, the judgment-debtor, the petitioner, deposited in Court Rs. 1,335-10-9, and asked the Court to set aside the sale under s. 310A of the Civil Procedure Code, which section became part of the Code under the provisions of Act V of 1894 passed on March 2nd, 1894. The decretal amount was Rs. 1,253-14-9; the purchase-money was Rs. 1,174 on the part of the auction-purchasers, Shaw Wallace & Co., and Rs. 10 on the part of the decree-holder: 5 per cent. on this was Rs. 59-4. The rest of the Rs. 1,335-10-9 was payable in respect of sale fees, Rs. 22.

"The District Judge refused to set aside the sale, holding himself bound by the decision of a majority of a Bench of five Judges of this Court in the case of *Girish Chunder Basu* v. *Apurba Krishna Dass* (1) pronounced on the 8th August 1894, together with the principle enunciated in the case of *Uzir Ali* v. *Ram Komal Shaha* (2).

" Upon the hearing of this rule these cases were cited before us.

"It was contended that, inasmuch as there were no proceedings in execution pending at the time the Act V of 1894 was passed (2nd March 1894), and as the Small Cause Court itself was not competent to issue execution against immoveable property, the decisions referred to did not govern the present case.

[770] "We think, however, that the present case is governed by those decisions. If the enactment does, as the decisions of this Court

(1) 21 C. 940. (2) 15 C. 383.

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seem to affirm, confer on the judgment-debtor a new right, or take away a vested right from the judgment-creditor, we see no answer to the arguments addressed to us against the rule that immediately on the decree being passed, and the relation of judgment-creditor and judgment-debtor being thereby constituted, the rights of each of them in respect of execution attach, before any steps in execution are actually taken.

"We should, therefore, feel compelled in obedience to these decisions to discharge the rule.

"*First.*—If the matter were *res integra*, we should hold first that from the general scope and purpose of the Act, it was intended to be retrospective, whether it did create a new right or affect a vested right or not?

"*Second.*—That the Act does not create a new right or affect a vested right. As to the judgment-debtor, it does not, we should think, create a new right in him. Proceedings in execution are in derogation of his ordinary right to keep his own property. They are necessary in order that he may be compelled to pay his debts; but we should think that an enactment which mitigates any harshness which may be found in the existing law relating to execution, could not properly be said to create any new right in the judgment-debtor; but only to lessen, so far as may be found possible, the degree in which execution-proceedings shall interfere with his existing rights in his own property.

"As to the judgment-creditor, his right is to be paid his money, and we should not think that he had any vested right in any needless harshness, with which the law may have hitherto enforced his claims for him against the property of his debtor; needless, that is, as being beyond what was necessary to secure payment of his claim. The decision in the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (1) is not that of a Full Bench according to the rules. No definite question was referred to, or decided by, the Court, and we are therefore at liberty in point of form to refer the case to a Full Bench.

[771] "Should the Full Court think proper to do so, we would also submit that it would be desirable that the decision of the Full Bench in the case of *Lal Mohun Mookerjee* v. *Jogendra Chunder Roy* (2), which governed the decision in the case of *Uzir Ali* v. *Ram Komal Shaha* (3), and also the latter decision, and both of which bear on the case we refer, should be considered. The matter is one of the very greatest importance since Act V of 1894 was passed. We, therefore, refer to the decision of a Full Bench, or, if permitted, to the Full Court the question :—

"*First.*—Whether the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (1) was rightly decided ?

"*Second.*—And, if permitted to do so, we would also refer to the Full Court the question whether the cases of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2) and *Uzir Ali* v. *Ram Komal Shaha* (3), above referred to, were rightly decided ?"

The reference was heard before the Full Court.

Babu *Girish Chunder Chowdhry* and Babu *Horendra Nath Mukerjee*, for the judgment-debtor.

Mr. *P. O'Kinealy* (with him Mr. *G. B. McNair* and Mr. *C. T. Geddes*), for the auction-purchasers.

Babu *Girish Chunder Chowdhry*.—The preamble to Act V of 1894 says that it is an Act to amend the Code of Civil Procedure, and it further

(1) 21 C. 940. (2) 14 C. 636. (3) 15 C. 383.

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says, that it shall come into force *at once*. From the language of the Act, and having regard to its scope and object of the Act, it appears that the Legislature intended that it should have retrospective effect: see Hardcastle's Construction of Statutes, p. 374. It is to remedy an evil that s. 310 A was enacted by the Civil Procedure Amendment Act, V of 1894, and the effect of the preamble saying that the Act shall come into force *at once*, is that this section is incorporated into the Civil Procedure Code, and operates in the same way as other sections of Chapter XIX of the Code. If it is contended that s. 310 A is not intended to have retrospective effect, this anomaly will arise, *viz.*, that this section will not commence to operate at all **[772]** unless the suit were brought on or after the 2nd March 1894, the day on which the Act was passed, and a decree were obtained and execution-proceedings taken subsequent thereto. In this view the words "at once" can have no meaning The Act applies to sales only, and will operate only on sales, taking place after the 2nd March 1894. It is a rule of procedure. The judgment-debtor had no remedy under the Code of 1882, except under s. 311. The new Act is a remedial Act, having in view sales held for low prices to the injury of judgment-debtors, and a beneficial construction ought to be put on it. See Maxwell's Interpretation of Statutes, s. 2, page 84 (second edition).

No new right has been conferred on a judgment-debtor by s. 310A. He has a right in his own property, and no doubt the judgment-creditor has a right to get his money, either from his person or property. But the judgment-debtor has a right to protect his own property by paying the money. If he pays the money, no sale takes place. It is no new right but a remedy against injurious sales and for the protection of a judgment-debtor's property by another mode. Section 310A does not affect any vested right of the judgment-creditor. The vested right of the judgment-creditor is to get his money. It extends up to the time of the sale. The new Act does not affect any vested right of the judgment-creditor, as any such right arises only after the sale. The case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (1) is clearly distinguishable. In that case all the proceedings in execution took place before the 2nd March 1894, except the sale, which was after that date. In the present case, the execution-proceedings began before the Act came into force. Under section 310A, the decree-holder gets his money, the purchaser gets his money, the Court gets the costs. So it does not affect any vested right of anybody. Section 310A is a rule of procedure. It is similar to s. 174 of the Bengal Tenancy Act. The section is incorporated in a Chapter (*i.e.*, chapter XIX) which deals purely with procedure. It is embodied among the rules relating to sales of **[773]** immoveable properties. The procedure in ss. 310A and 311 is the same. The Court has to set aside the sale; therefore s. 310A is a rule of procedure. It simply points out another mode of getting the sale set aside. It is worded similarly to s. 174 of the Bengal Tenancy Act. The case of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2) is distinguishable, and the case of *Uzir Ali* v. *Ram Komal Shaha* (3) is not correctly decided. Execution-proceedings are a new set of proceedings, and the new law will govern those proceedings. See *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (4), *Deb Narain Dutt* v. *Narendra Krishna* (5), *Becharam Dutta* v. *Abdul Wahed* (6).

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(1) 21 C. 940. (2) 14 C. 636. (3) 15 C. 383.
(4) 7 B. 459. (5) 16 C. 267 (279). (6) 11 C. 55.

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Mr. *O'Kinealy*, for the auction-purchasers.—There is considerable difference between s. 310-A of the Civil Procedure Code and s. 174 of the Bengal Tenancy Act. Because it is held that s. 174 is a rule of procedure, it does not follow that s. 310-A is a rule of procedure also. It will be observed that s. 310-A, upon the face of it, curtails or takes away the advantage that is conferred by s. 174 on the judgment-creditor. For under s. 174 the judgment-creditor can realize the whole debt, *i.e.*, the decretal amount, costs, expenses of the sale, &c., but under s. 310-A he can only get the amount that is mentioned in the sale proclamation. I refer to the conditions of sale given in the sale proclamation. It was not intended by the Legislature that Act V of 1894 should have retrospective effect. It should be taken to have come into force in the ordinary way like other Acts. See *Doe d. Evans* v. *Page* (1) The words "at once" show that it cannot have retrospective effect: see *Queen* v. *Leeds and Bradford Railway Company* (2). It is wrong to say that the Act is remedial; but, supposing it is so, it does not follow that it must have retrospective effect: see *Williams* v. *Harding* (3). The position of s. 310-A in Chap. XIX of the Code does not strengthen the case of the other side. There are sections in [774] Chap. XIX, in which s. 310-A is incorporated, which do not deal with procedure. The case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (4) cannot be touched without interfering with the cases of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (5) and *Uzir Ali* v. *Ram Komal Shaha* (6). Previous decisions of this Court are binding: see *In re Terrell* (7). The same rule is laid down in *Kimbray* v. *Draper* (8). Therefore the previous Full Bench cases are binding. [BANERJEE, J.—Section 310-A does not apply merely to judgment-debtors, but to any person whose property has been sold.] Yes, but it does not apply to *benamidars*. The word "judgment-debtor,' is used in s. 174 of the Tenancy Act, but it is not used in s. 310-A of the Civil Procedure Code. The judgment in the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (4) is conclusive of this case, if the principle enunciated in the cases of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (5) and *Uzir Ali* v. *Ram Komal Shaha* (6) is sound. If the decisions in the two last mentioned cases cannot be disturbed, then the decision in the case of *Girish Chunder Basu* v. *Apurba Krishna Dass* (4) cannot also be disturbed. If the decisions in those two Full Bench cases are wrong, that, is, not conclusive, then the decision in the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (4) is also wrong. The cases decided under s. 174 of the Bengal Tenancy Act do not necessarily apply to cases under s. 310-A of the Code of Civil Procedure.

This rule ought to be discharged. It is a rule issued under s. 622 of the Code of Civil Procedure. The order of the District Judge cannot be revised under s. 622. Where a point of law is argued and decided by a Judge, the High Court cannot revise it under s. 622. The Judge was bound to follow the Full Bench cases, and therefore he has not acted illegally or with material irregularity in the exercise of his jurisdiction.

Babu *Grish Chunder Chowdhry*, in reply.

[775] The following judgments were delivered by the Full Court:—

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(1) 5 Q. B. 767. (2) 18 Q.B. 343. (3) L.R. 1 E. and I.A. 9.
(4) 21 C. 940. (5) 14 C. 636. (6) 15 C. 383.
(7) L.R. 4 Ch. D. 293 (296). (8) L.R. 3 Q.B. 160 (163).

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JUDGMENTS.

BANERJEE J. (PETHERAM, C.J., and PRINSEP, NORRIS, PIGOT, MACPHERSON, GHOSE, HILL, GORDON, SALE and STEVENS, JJ., concurring).—The questions which have been referred to the Full Court for decision in this case are :—

First.—Whether the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (1) was rightly decided?

Second.—Whether the cases of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy*(2) and *Uzir Ali* v. *Ram Komal Shaha*(3) were rightly decided?

In the case of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2), the earliest of the three cases referred to above, the question was whether s. 174 of the Bengal Tenancy Act was applicable to a sale held after that Act had come into operation. when the execution had been applied for, and sale proclamation issued, under Bengal Act VIII of 1869. The Full Bench answered the question in the negative, holding that s. 174 of the Bengal Tenancy Act could not have any retrospective operation, as it conferred upon judgment-debtors a new right which they did not possess under the old Act, and as the proceedings had commenced before the new Act came into force.

In the next case in order of time, *Uzir Ali* v. *Ram Komal Shaha* (3), the question was whether s. 174 of the Bengal Tenancy Act applied to a sale held under an execution applied for after that Act had come into operation, when the decree was passed under the old Act. The Full Bench answered the question in the negative, holding that the case was not distinguishable in principle from that of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2).

In *Girish Chundra Basu* v. *Apurba Krishna Dass* (1), the last of the three cases referred to above, the question was whether s. 310-A of the Code of Civil Procedure, which was added to the Code by Act V of 1894, was applicable to a sale held after the date on which that Act came into operation, when [776] the execution had been applied for, and sale proclamation issued, before that date. The majority of the Bench which heard the case answered the question in the negative, following the two earlier cases relating to s. 174 of the Bengal Tenancy Act and holding that s. 310-A of the Civil Procedure Code, like s. 174 of the Tenancy Act, was a provision conferring a right and not relating merely to procedure.

These decisions, no doubt, are all based upon the general ground that a provision of law like that contained in s. 174 of the Bengal Tenancy Act, or s. 310-A of the Civil Procedure Code, confers a new right on judgment-debtors, and should not, therefore, be held applicable to any case in which the decree was passed before such provision came into force; but as the three cases differ from one another in certain points, and as it remains to be seen whether, even if the general ground mentioned above be not a sound one, those points of difference may not afford ground for justifying the decision in one case, though not in another, it is convenient to consider the cases separately.

I shall consider first the case of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2) as being the earliest of the three cases and the strongest one for the decree-holder and the auction-purchaser in whose favour the decision was given. In this case Mitter, J. who delivered the judgment of the Full Bench, said: "We are of opinion that an application under s. 174

(1) 21 C. 940. (2) 14 C. 636. (3) 15 C. 383.

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of the Bengal Tenancy Act cannot be entertained in respect of sales held in execution of decrees made before the date when that Act came into operation, the execution of the decree having been applied for before the aforesaid date. Section 174 of the Bengal Tenancy Act confers upon the debtors a new right which they did not possess under the old Act. Therefore the presumption is (in the absence of express legislation or direct implication to the contrary) that its operation is not intended to be retrospective. Its provisions cannot, therefore, be applied to proceedings commenced before the Act came into operation." The reasoning in this judgment consists of two distinct and independent parts.

[777] The first part is to the effect that, since a law which creates a new right ought not to have retrospective effect, and since s. 174 of the Bengal Tenancy Act creates a new right in favour of judgment-debtors, therefore s. 174 ought not to have retrospective effect, that is, effect in cases in which the decree by which the applicant became a judgment-debtor was made before that section became law.

And the second part is to the effect that, since proceedings commenced under any law ought not to be affected by any change in that law, and since the proceedings in this case were commenced under the old rent-law, therefore they ought not to be affected by s. 174.

These two branches of the reasoning require separate examination.

I must respectfully dissent from the conclusion in the first part of the above reasoning, as I am unable to accept the premises upon which it is based as correct.

It the first place, to my mind, the broad general proposition, which this reasoning adopts as its major premise, namely, that a law creating a new right ought not to have retrospective effect, is not universally true. Ordinarily, no doubt, a new law should affect only future transactions and not past ones: *Urquhart* v. *Urquhart* (1). But the rule against retrospective operation is intended to apply not so much to a law creating a new right as to a law creating a new obligation or interfering with vested rights : see *Reid* v. *Reid* (2), *Gardner* v. *Lucas*(3). This is how the rule has generally been understood and laid down in text-books. Maxwell in his treatise on the interpretation of statutes says : " It is chiefly when the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question operates. Every statute, as has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already [778] passed, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation" (2nd edition, p. 257). [See also Wilberforce on Statute Law, page 157 ; Sedgwick on Statutory Law, 2nd edition, 160.]

As the creation of a new right in one class of persons is generally attended with the imposition of new obligations on, or the interference with vested rights of other classes, a law creating a new right would, in general, be subject to the rule against retrospective operation. But where, as in this case, the new right (conceding for the moment that it is a new substantive right) is created expressly under conditions which prevent its imposing any new obligation on, or its interfering with any vested right in others, the reason for the rule ceases to exist, and the rule must, therefore, cease to be operative. The only persons who can possibly be affected by

(1) 1 Macq. H.L.C. 662. (2) L.R. 31 Ch. D. 408. (3) L.R. 3 App. Cas. 582.

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a provision like that contained in sub-ss. 1 and 2 of s. 174 of the Bengal Tenancy Act, in favour of the judgment-debtor, are the decree-holder and the auction-purchaser; and the section expressly provides that the judgment-debtor is entitled to have the sale set aside only upon payment, not merely of compensation to the purchaser, but also of the whole amount due under the decree with costs to the decree-holder. Thus the vested right of the decree-holder, which is to obtain satisfaction of his decree, is left unaffected by this provision, except so far as it is to his advantage; for the sale may not always pay him in full, but the application of s. 174 in every case will. As regards the auction-purchaser, five per centum on the purchase-money, though ordinarily a sufficient compensation, may not be so when he makes a very favourable bargain; but as the sale took place after the new law came into operation, and he must be taken to have made his bid with full knowledge of the law, it cannot be said that any vested right of his is affected by it.

Then, in the second place, I do not think that s. 174 creates any new substantive right in the judgment-debtor. It embodies in substance a rule of procedure, which provides that, after a sale in execution of a decree has taken place and before it is confirmed, if the judgment-debtor deposits a certain sum in Court, the decree-holder shall realize his dues out of the amount so deposited, and not out of the sale proceeds and the **[779]** auction-purchaser, whose right does not become perfect until the sale is confirmed by the Court, shall not be entitled to have the sale confirmed, but shall receive back the purchase-money with a certain compensation out of the money deposited. It being thus really a matter of procedure, there can be no objection to its having effect immediately, even though it should affect past transactions and the mode of enforcement of vested rights. [see *Gardner* v. *Lucas* (1)], "provided, of course," as Mellish, L.J., said in the case of the *Republic of Costa Rica* v. *Erlanger* (2), "that no injustice is done." And I have shown above that this condition is here fully satisfied.

Then, again, it is assumed, in the above reasoning, that the operation which the applicant under s. 174 of the Bengal Tenancy Act sought to give to that section was retrospective in its nature, and it is further assumed that there is nothing implied in the scope and purposes of the section to show that it was intended to have any retrospective effect: assumptions the correctness of which I am by no means prepared to admit.

When the sale which was sought to be set aside in this case was held after the new Act had come into operation (and I may add that the same was the state of facts in the other two cases and also in the case which has given rise to this reference), the assumption that the application of the Act to such a sale would be to give it retrospective effect is, in my opinion, not a correct assumption. In setting aside, under s. 174, a sale held after that section had become law, the direct effect of the section would be prospective only, though the sale might depend upon a decree and execution-proceedings of dates antecedent to that of its becoming law. This distinction is well pointed out by Lord Denman in the *Queen* v. *The Inhabitants of St. Mary Whitechapel* (3), in which his Lordship, speaking of a statute which is in its direct operation prospective, said: "It is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing;" and this observation applies with peculiar force to a case like the one now under consideration,

(1) L. R. 3 App. Cas. 603. (2) L. R. 3 Ch. D. 69. (3) 12 Q. B. 127.

[780] where the facts antecedent to the passing of the new law go so little to determine the person who is really affected by the application of the new law, I mean the purchaser.

Then, as regards the second assumption, no doubt it is true that the Bengal Tenancy Act contains no express words to indicate that s. 174 is to have any retrospective effect. But though there may not be any express words to that effect, still it may be shown by the general scope and purpose of the enactment that it is intended to have retrospective effect. See *Pardo* v. *Bingham* (1). And if we look to these, there can remain very little doubt as to what the Legislature intended in the present instance. Under the old law, if a tenure or holding was sold in execution of a decree for rent, and the sale was for inadequate value, the tenant could get the sale set aside only if he could prove that the inadequacy of price was due to some irregularity in publishing or conducting the sale; and, if there was no such irregularity, but the sale nevertheless resulted in loss, however great the loss might be, the tenant was obliged to bear it as a necessary evil. It was this evil which s. 174 of the Bengal Tenancy Act was intended to remedy, and it is difficult to imagine that the Legislature intended to limit the remedy to those cases in which the sales were held in execution of decrees made subsequently to the passing of the Act, and to allow the evil to continue for years to come, during which decrees made under the old Act might go on being enforced by the sale of tenures or holdings, when the application of the new law to sales in execution of decrees passed under the old law could not possibly have resulted in any hardship or injustice. As a remedial provision, it ought to be liberally construed so as to apply to every sale of a tenure or holding in execution of a decree for arrears of rent, held after the passing of the Act, irrespective of the date of the decree.

The second branch of the reasoning in *Lal Mohun Mukerjee's* case (2) requires separate examination. The sale was held in the course of execution-proceedings instituted under the old Act (Bengal Act VII of 1869), which was repealed by the Bengal Tenancy Act. Now, s. 6 of the General Clauses Act I of 1868 provides that [781] the repeal of any Act shall not affect any proceeding commenced before the repealing Act shall have come into operation, and whatever doubt there may be as to whether a proceeding in execution is a proceeding in a suit [as to which point see *Deb Narain Dutt* v. *Narendro Krishna* (3), and Code of Civil Procedure, s. 647, Explanation], there can be no room for doubt that the execution-proceeding in this case was a proceeding "commenced before the repealing Act came into operation." It might be said, therefore, that the execution-proceeding in this case was unaffected by the repeal of Bengal Act VIII of 1869, and, therefore, unaffected by the provisions of s. 174 of the repealing Act. No doubt the operation of s. 6 of Act I of 1868, in making pending proceedings continue to be regulated by the old procedure, is limited to cases in which the change in the law is the result of repeal of the old enactment, and does not extend where it is due merely to an addition to it. But it may not be clear that s. 174 of the Bengal Tenancy Act is purely a provision of this latter description. It is one of a group of provisions in an enactment which repeals the old law and takes its place. If the matter had been unaffected by the provisions of s. 6 of the General Clauses

(1) L.R. 4 Ch. App. 740. (2) 14 C. 636. (3) 16 C. 267.

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Act, I should have felt little hesitation in saying that this part of the decision in *Lal Mohun Mukerjee's* case (1) was also incorrect. As it is, and as this point was not discussed in the argument before us, and does not affect the decision of the case which has given rise to this reference, I do not think it desirable to pronounce any decided opinion upon it; though I may add that the object of s. 6 of the General Clauses Act may be simply to leave proceedings commenced under the old Act unaffected by the repealing Act, only so far as they have proceeded, leaving their further progress to be regulated by the procedure in force after the repeal; upon which view the second branch of the reasoning will not have any greater force than the first.

In my opinion, therefore, the decision in *Lal Mohun Mookerjee's case* (1), so far as it holds that s. 174 of the Bengal Tenancy [782] Act creates a new right in a judgment-debtor, and is, therefore, inapplicable to a case in which the decree was passed before that Act became law, is wrong; but I abstain from pronouncing any opinion upon the correctness of the other ground of the decision, namely, that the section was inapplicable to the case by reason of its being a pending proceeding instituted under the old law.

The case of *Uzir Ali* v. *Ram Komal Shaha* (2) need not detain me long. It is based wholly upon the first of the two grounds upon which the decision in *Lal Mohun Mukerjee's case* (1) is based, namely, that s. 174 creates a new right in favour of the judgment-debtor; and, as I have shown above that that ground is not sound, I must say that this case was incorrectly decided.

It remains now to examine the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (3). The majority of the learned Judges, who decided that case, were of opinion that it was governed by the principle laid down by the Full Bench decisions in the cases of *Lal Mohun Mukerjee* (1) and *Uzir Ali* (2). But as I have, for the reasons given above, said that the principle laid down in those cases that a provision like that in s. 174 of the Bengal Tenancy Act creates a new right, is not a correct one, I must say that the case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (3) was incorrectly decided. Though here the execution-proceedings were instituted under the old law, the case is unaffected by s. 6 of the General Clauses Act, as the change in the law was brought about, not by the repeal of the old Act, but by the addition to it of a new section, namely, s. 310-A. And all that I have said above with reference to *Lal Mohun Mukerjee's case* (1), excepting so much as relates to the effect of s. 6 of Act I of 1868, applies with full force to this case.

It was argued for the auction-purchaser that s. 310-A of the Code of Civil Procedure differs from s. 174 of the Bengal [783] Tenancy Act, in being less favourable to the decree-holder than the latter provision, as it does not provide for the immediate payment by the judgment-debtor of the costs and interest accruing after the issue of the sale proclamation, and not entered in it. I do not consider this a material point of distinction at all, as the decree-holder's right to realize these costs and interest remains unaffected by s. 310-A.

I would, therefore, answer the questions referred to us as follows —

1. The case of *Girish Chundra Basu* v. *Apurba Krishna Dass* (3) was not rightly decided.

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(1) 14 C. 636. (2) 15 C. 383. (3) 21 C. 940.

2. The case of *Uzir Ali* v. *Ram Komal Shaha* (1) was not rightly decided; nor was the case of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2) rightly decided, so far as it laid down the principle that s. 174 of the Bengal Tenancy Act created a new right in judgment-debtors, and was, therefore, inapplicable to a case in which the decree was passed before that Act came into operation.

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But upon the question whether the order made in the last-mentioned case was right under s. 6 of General Clauses Act, by reason of the execution-proceeding having been commenced under Bengal Act VIII of 1869, I pronounce no opinion.

It was contended on behalf of the auction-purchaser that whatever may be the decision of the Court upon the questions referred to it, it could not interfere, under s. 622 of the Code of Civil Procedure, with the order complained of in the case which has given rise to this reference. But if I am right in the view I take of s. 310-A of the Civil Procedure Code, the Court below was bound, upon the application of the judgment-debtor in this case, to set aside the sale under that section, and, not having done so, it has "failed to exercise a jurisdiction vested in it by law," within the meaning of s. 622, so as to make its order open to revision by this Court.

I would, therefore, make the rule absolute.

BEVERLEY, J.—I concur in the able judgment of Mr. Justice **[784]** Banerjee, with this reservation, that it does not appear to me from the report of the case of *Lal Mohun Mookerjee* v. *Jogendra Chunder Roy* (2), that the learned Judges who decided that case intended to base their judgment in any way on s. 6 of the General Clauses Act I of 1868.

S.C.G. *Rule made absolute.*

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22 C. 784.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

SURRUT COOMARI DASSEE AND ANOTHER v. RADHA MOHUN ROY.* [3rd June, 1895.]

Small Cause Court (Presidency Towns)—New Trial, Second application for—Presidency Small Cause Court Act (XV of 1882), s. 37—Practice—Civil Procedure Code (Act XIV of 1882), s. 622—Act IX of 1850, s. 53.

The Judges of the Calcutta Small Cause Court have power to entertain in the same suit more than one application for a new trial. There is nothing in s. 37 of Act XV of 1882 prohibiting such a practice. It is in accordance with the practice of Courts in England to allow such applications.

Pursonchund Golacha v. *Kanooram* (3) followed.

[D., 3 C.L.J. 199 (201); 4 C.L.J. 46=10 C.W.N. 14.]

ON the 23rd May 1894 a suit was instituted in the Small Cause Court before the Third Bench by Radha Mohun Roy against Nilrutton Sen and Kader Nath Mitter, two of the executors of the will of Kherode Chunder Mitter, deceased, to recover the sum of Rs. 258-9-6.

On the 6th June 1894 that suit was dismissed.

On the 14th June 1894 the plaintiff made an application for a new trial under s. 37 of Act XV of 1882 (the Presidency Small Cause Court Act), which came on for hearing before the Chief Judge and the

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* Application in the matter of s. 622 of the Code of Civil Procedure and in the matter of claim suit 22510 in the Calcutta Court of Small Causes.

(1) 15 C. 383. (2) 14 C. 636. (3) 10 B.L.R. 355=19 W.R. 203.

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Third Judge on 11th August 1894, when the original order dismissing the suit was set aside and a decree entered in favour of the plaintiff for the sum of Rs. 258-9-6 to be realized [785] out of the assets of the estate of Kherode Chunder Mitter, deceased. In order to satisfy this decree, certain immoveable property, belonging to the estate of Kherode Chunder Mitter was, on the 21st September 1894, attached in execution.

Kherode Chunder Mitter, deceased, had, however, by his will, appointed five executors, one of whom had renounced probate, but the remaining four had proved the will, and acted as *de facto* managing executors of the estate of the deceased. They all resided within the jurisdiction of the Small Cause Court.

The remaining two executors, Surrut Coomari Dassee and Nundo Lall Bose, on 3rd November 1894, instituted, before the Fifth Bench of the Small Cause Court, a claim suit against Radha Mohun Roy, the plaintiff in the original suit, for the release of the attachment on the immoveable property of Kherode Chunder Mitter, deceased, on the ground that they were not made parties to the original suit under s. 438 of the Code of Civil Procedure; and that, therefore, the order of attachment had no binding force against the estate, which vested in all four of the executors under s. 4 of the Probate and Administration Act. On the 5th December 1894 that suit was dismissed, and on the 7th December 1894 the plaintiff-executors made an application for a new trial under s. 37 of Act XV of 1882, which, on the 21st of January 1895, came on for hearing before the Chief Judge and the Fifth Judge. The original order dismissing the claim suit was thereupon set aside, and an order made for the release of the properties attached.

On the 26th January 1895 Radha Mohun Roy, the plaintiff in the original suit, applied for a second new trial, which came on for hearing before the Chief Judge and the Fifth Judge on the 22nd February 1895; but the application was dismissed, the learned Judges holding that they had no power or jurisdiction to entertain such an application.

On the 18th March 1895 a rule was obtained in the High Court under s. 622 of the Code of Civil Procedure, by the plaintiff in the original suit, Radha Mohun Roy, calling on the plaintiffs in the claim suit to show cause why the High Court should not call for the records of the case, and make such order as it may think fit.

[786] The rule came on for hearing before SALE, J.

Mr. *Garth* showed cause.

Mr. *Dunne*, in support of the rule.

On the 3rd June 1895 the rule was made absolute on the following grounds:—

ORDER.

SALE, J.—The question involved in this rule is as to whether the Judges of the Small Cause Court have power to hear more than one application for a new trial in the same cause. The question arises in this way: The plaintiff, on the 11th August 1894, obtained a decree for a sum of Rs. 258-9-6, and in execution of the decree proceeded to attach certain property. Two claimants then applied to have the attachment set aside. On the 5th December 1894, the claim was dismissed. On the 7th December 1894 an application for a new trial was made by the claimants, and on the 21st January 1895, the Bench hearing the application made a decree in the claim suit directing the property to be released from the attachment. On the 26th January 1895 the plaintiff applied

to have a new trial of the application, which had been granted on the 21st January 1895, under which the property had been released from attachment. The learned Judges, before whom the application was made, thought they had no power to entertain a fresh application, holding, apparently, that, under s. 37 of the Small Cause Court Act, there could only be one application for a new trial in the same suit. The question is whether that view is correct. Section 37 provides: "Save as is herein especially provided, any decree of the Small Cause Court shall be final and conclusive. But the Court may, on application of either party, made within eight days from the date of the decree or order in any suit (not being a decree passed under s. 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings."

Now, in this instance, the learned Judges in making their order on the application for a new trial did not direct a rehearing, but directed the property to be released from attachment. That order, therefore, became the existing decree or order in the claim suit. [787] Mr. Garth contends that it was never intended by s. 37 that there should be successive applications for new trials, and he points out the inconvenience which might result from any such view. But the question is, whether the Legislature has thought fit, by the words which they have adopted in s. 37, to prevent more than one application being made for a new trial in the same suit, and it is quite clear, if Mr. Garth's contention is correct, that the words "decree or order" must be read as "the original decree or order." But it seems to me, I am not at liberty to put any such restrictive meaning upon the words. I think the words "decree or order" must be read "the decree or order existing or subsisting in the suit." The same view was adopted by Sir Richard Couch and Mr. Justice Pontifex in the suit of *Pursonchund Golacha* v. *Kanooram* (1), which was a reference to the High Court by the first and second Judges of the Small Cause Court of Calcutta. In that case the same question arose under the provisions of s. 53 of Act IX of 1850. The words of that section are not precisely the same as the words of s. 37; but I think that the meaning, both of s. 37 of the present Act, and of s. 53 of the old Act, is substantially the same. As regards the earlier section, Sir Richard Couch says: "The language of s. 53 of Act IX of 1850 is certainly sufficiently large to allow of an application for a new trial, after a previous trial," and he proceeds to point out that to allow such new trials after previous new trials, would be in accordance with the practice of the Courts in England. He says: "There are instances in England in the Common Law Courts and in the Courts of Equity, where more than one trial has been granted, it appearing proper that it should be done. We think the same rule may be applied here. We must assume that the Judges of the Small Cause Court will not exercise this power, unless it appears to them to be right to do so, and they have power to impose such terms as they may think reasonable."

It appears to me it was not the intention of the Legislature, in using the words of s. 37, to change the practice laid down under the previous Act, and if any change is to be made [788] it ought to be so made by clear statutory enactment rather than by the adoption of a construction which would be at variance with the existing rule regulating the practice

(1) 10 B.L.R. 355 = 19 W.R. 203.

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of the Court. I think, therefore, the Judges of the Small Cause Court have the power to hear the application for a new trial. That is the only point that I decide.

The costs of the present application will abide the result of the application for a new trial.

Attorney for the plaintiffs in the claim suit: Babu *Kedar Nath Mitter.*

Attorney for Radha Mohun Roy the plaintiff in the original suit: Mr. *W. Swinhoe.*

C. E. G.

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22 C. 788 (P.C.) = 22 I.A. 107 = 6 Sar. P.C.J 603.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, Macnaghten, and Shand, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

THE ADMINISTRATOR-GENERAL OF BENGAL (*Defendant*) v. PREMLAL MULLICK (*Plaintiff*) AND OTHERS.
[20th February and 30th March, 1895.]

Administrator-General's Act (II of 1874), s. 31—Transfer by Hindu executor to Administrar-General—Construction of Statutes.

The right of executors to devolve the property of their testator, with all powers and duties relating to its administration, upon the Administrator-General, conferred by s. 31 of Act II of 1874, is not confined to any particular class of executors or of estates. The right is given to any executor in whom the estate of the deceased has been vested by virtue of the probate upon the one condition that the Administrator-General shall consent.

It is not required that in a consolidating statute, each enactment, when traced to its source, must be construed according to the state of things which existed at a prior time when it first became law; the object being that the statutory law, bearing on the subject, should be collected and made applicable to the existing circumstances; nor can a positive enactment be annulled by indications of intention, at a prior time, gathered from previous legislation on the matter.

Proceedings of the Legislature in passing a statute are excluded from consideration on the judicial construction of Indian, as well as of British, statutes.

[789] Executors having obtained probate of the will, and possession of the estate, of a Hindu testator, executed a deed, purporting to be in terms of s. 31, Act II of 1874, transferring the property, vested in them by the probate, to the Administrator-General.

Held, reversing the judgment of a majority of the appellate Court, and affirming that of the Chief Justice, that this transfer was valid under that section.

[F., 22 B. 112; 22 C. 1017 (F.B.); 1 L.B.R. 231 (232); 26 P.R. 1902 = 26 P.L.R. 1902; Rel., U.B.R. (1897–1901) (Cr.) 370; R., 22 B. 1 (5); 37 C. 839 (843) = 15 C.W.N. 185 = 8 Ind. Cas. 655; 7 A.L.J. 370 (383) = 5 Ind. Cas. 503 (508); 2 C. L.J. 546 (553); 13 C.L.J. 625 (631) = 6 Ind. Cas. 392; 16 C.P.L.R. 145 (149); 1 L.B.R. 110 (111) (F.B.); 2 L.B.R. 146 (152) (F.B.); 3 N.L.R. 40 (45); P.L. R. (1900) 488 (501); 22 T.L.R. 222 (229); 14 M.L.T. 455 = (1913) M.W.N. 937 (939) = 22 Ind. Cas. 107 (109).]

APPEAL from a decree (1) (16th May 1894) of an appellate Bench of the High Court affirming a decree (21st December 1893) made in the exercise of the ordinary original Civil jurisdiction.

This suit was brought on the 6th September 1893 by the minor adopted son of Babu Nundo Lal Mullick, a Hindu, who died in 1891, having made his will, dated the 5th August 1889. The plaintiff, through

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(1) *The Administrator-General* v. *Premlal Mullick*, 21 C. 732.

the widow as his guardian, claimed that the estate of the deceased should be administered under the direction of the Court, that a Receiver should be appointed, and that an injunction should be granted restraining the Administrator-General from taking possession of the estate, the executors having transferred to that officer, on the 14th August 1893, all estates, effects and interest vested in them in virtue of the probate obtained by them on the 17th March 1891. The defendants were the Administrator-General, who alone now appealed, and the two executors, Sambhunath Roy and Dwarkanath Bunjo. The two latter, who were joined as respondents, did not appear on this appeal.

No written answer was filed. On the 22nd September 1893 application was made by the plaintiff for an injunction to restrain the present appellant from disposing of part of the estate which had been advertised for sale, and for the appointment of a Receiver. These were granted on the 21st December 1893 by SALE, J., sitting in exercise of the original jurisdiction. He was of opinion that the transfer by the executors was not authorized by s. 31 of the Administrator-General's Act, II of 1874. His reasons are given at length in his judgment reported in I. L. R. 21 Calc. 732. Having held the transfer to be invalid, he appointed a Receiver of the property belonging to the estate of the deceased.

An appeal was preferred by the Administrator-General, and [790] heard on the 23rd, and three subsequent days of January 1894 by a Bench (PETHERAM, C.J., and PRINSEP and TREVELYAN, JJ.) A majority of the Judges affirmed the decision below, but the Chief Justice differed from them, holding the transfer to have been valid under s. 31, Act II of 1874. The judgments are given at length in I. L. R. 21 Calc., 732.

On the 5th April 1894, the appeal of the Administrator-General to Her Majesty in Council was declared by the High Court to have been admitted.

Sir *R. Webster*, *Q.C.*, and Mr. *J. D. Mayne*, for the appellant, argued that the judgment of the Chief Justice was right, and that the decree following the decision of the majority should be reversed. The opinion that the Legislature had not authorized the administration of the estate of a Hindu testator by the Administrator-General, the latter consenting to take a transfer from the executors, was not well founded. It was not necessary to the appellant's case to maintain that before 1870 the executors of a Hindu's estate might have made a transfer under s. 30 of Act XXIV of 1867. Whether before 1870 he could, or could not, have made such a transfer, he had another power conferred upon him after the change in the law, whereby he came to answer the description of an executor deriving title in virtue of the probate—a position which he occupied when by the Hindu Wills Act, XXI of 1870, s. 179 of the Indian Succession Act of 1865, was, with other section of that Act, extended to the wills of Hindus. The effect of that sections, with s. 187, also extended, was that to establish his right the executor must have probate, and that in him when he had obtained probate the property of the deceased vested. There was nothing in s. 5 of the Hindu Wills Act of 1870 which declared that nothing in that Act should affect the rights, duties, and privileges of the Administrator-General, nor was there anything in s. 66 of the Act, II of 1874, or in any of the Acts relating to this office, which could prevent full effect being given to s. 31 of Act II of 1874. The contention, for the appellant, was that

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s. 5 of the Hindu Wills Act of 1870, could not control the later enactment, II of 1874, even if it operated upon s. 30 of the prior Act, XXIV of 1867, though it was by no means admitted that it did counteract [791] s. 30 of the Act last mentioned. The main argument was that, as the result of the extension of s. 179 of the Indian Succession Act of 1865 to the wills of Hindus, and the unqualified re-enactment in 1874 of the power of executors to transfer to the Administrator-General, the latter was placed in the same position in regard to his capacity to take transfers from the executors of Hindu testators in which he was regarding his right to take a transfer from the executors of Anglo-Indians. Section 31 of Act II of 1874 was wide in its terms, and apparently was applicable to all executors who derived title from the probate. If intention was to be sought in a case of plain construction, the Legislature must have been aware that, since 1870, the Hindu executor had been the legal representative of the testator for all purposes, the property vesting in him as such, and that no right as a Hindu executor could be established by him unless he had obtained probate. That the Hindu executor, before 1870, derived no title from the probate, and was not until that year within the meaning of s. 30 of the Act, XXIV of 1867 (if that were so), afforded no reason for reading s. 31 of Act II of 1874 by the light only of the previous law relating to the Hindu executor, ignoring the legislation that had taken place and the change effected. It had been supposed below that s. 5 of the Act of 1870 prevented the operation of s. 31 of Act II of 1874, but that again was to make the law of the past affect and negative that of the present, though the latter had been enacted in positive terms. Hindu testators had been brought by the Legislation of 1870 within the same purview of the law as regarded the powers of executors to transfer to the Administrator-General, as the executors of those who belonged to the European community; and that officer had been placed, as regarded his capacity to take a transfer, in the same position in reference to the executors of Hindu testators that he already occupied with regard to the executors of Europeans in India. There was a fallacy in the argument that because Act II of 1874 was a consolidating Act, it must be taken to have been enacted with reference only to the state of things to which the provisions of earlier Acts related.

Mr. *H. H. Cozens Hardy, Q.C.*, Mr. *R. B. Finlay, Q.C.*, [792] and Mr. *J. H. A. Branson*, for the respondent, Premlal Mullick, contended that s. 31 of Act II of 1874 did not apply to Hindu executors of a Hindu testator, and that the executors of Nundo Lal Mullick had no power to transfer the estate of their testator to the appellant, who also was not authorized by law to take such a transfer. Until the Hindu Wills Act of 1870 was passed the estate of the testator did not vest in virtue of the probate. He derived title from the gift which the will made, taking nothing from any grant of the Court—*Sharo Bibi* v. *Baldeo Das* (1) and other cases cited in the judgments below on this point. Although that his testator's property vested in virtue of the probate resulted to the Hindu executor from the legislation of 1870, it did not follow that the *verbatim* re-enactment of s. 30 of the Administrator-General's Act of 1867, now s. 31 of the Act of 1874, could be construed as having, by reason of legislation intermediate between these two Acts, the effect of giving to Hindu executors the power to free themselves from their office by transferring to the Administrator-General. Nor did it follow that the latter

(1) 1 B.L.R.O.C. 24.

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could exercise a power that had been withheld from him in previous Acts. The re-enactment in 1874 of the section in identical words from Act XXIV of 1867 required that the law, as it stood at the date of the earlier enactment, should be referred to. In construing a consolidating Act, which merely re-enacted sections in prior Acts, an incidental effect could not be attributed to it of altering the law on a matter which would properly be the subject of express declaration, if alteration were intended by the Legislature. It ought not to be concluded that powers were added in the consolidating Act which were not within the contemplation of the prior Acts. Reference was made to *Mitchell* v. *Simpson* (1) (where the Sheriff's Act of 1887 was construed not to include a new state of things, but to have reference to the former law of attachment for debt). The judgments below had rightly given effect, in construing s. 31 of Act II of 1874, to the marked distinction in the position of the Hindu executor who obtained probate under the circumstances existing at the time when the Acts VII **[793]** of 1849, VIII of 1855, XXIV of 1867, afterwards consolidated by II of 1874, were passed; also the state of the law under the Indian Succession Act of 1865, s. 331. Section 17 of Act II of 1874 showed that s. 15 did not empower the Administrator-General to apply directly for the administration of the estate of a deceased Hindu within the local limits of the original jurisdiction, unless he could satisfy the Court that danger was to be apprehended to the estate unless letters should be granted. It could not be urged consistently with this that the Administrator-General could get a transfer of the estate by arrangement with an executor of it. Yet this incidental effect that the Administrator-General could arrange with an executor to take a transfer was, according to the appellant's case, to be attributed to the same Act. These restrictions upon the action of that officer were inconsistent with the effect that was sought to be given to s. 31. Again, the trusts of a Hindu will might impose duties, of maintaining and controlling religious establishments, that could not well be carried out by him. The gist of the legislation on this subject down to 1870 was that the Administrator-General should not administer the estates of Hindus. In 1874 the power to apply under exceptional circumstances and with a limit of locality was given. All this pointed to the construction of s. 31 placed upon it by the majority of the Court below, while the opposite construction would authorize the effecting in a circuitous manner what could not be done under orders obtained, in a direct manner, from the Court.

Sir *R. Webster*, Q.C., replied, relying on the argument that, as the result of the extension of s. 179 of the Indian Succession Act, 1865, to the executor of a Hindu testator, effected by the Hindu Wills Act, 1870, another power was given to that executor; and that the positive language of s. 31 of Act II of 1874 should receive effect.

JUDGMENT.

Afterwards on March 30th, their Lordships' judgment was delivered by

LORD WATSON.—Nundo Lal Mullick, a wealthy Hindu resident in Calcutta, died in February 1891, leaving a last will by which he disposed of his whole estate, real and personal, and appointed Dwarkanath Bunjo and Sambhunath Roy to be his **[794]** executors and trustees. These gentlemen accepted the office thus conferred on them; and in March 1891 they obtained a grant of probate from the High Court at Calcutta, and

(1) L. R. 23 Q. B. D. 373.

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proceeded to administer the trusts of the will. On the 14th August 1893 they executed a deed, by which they transferred the whole estates, effects and interests vested in them by virtue of the said probate to the appellant, the Administrator-General of Bengal, professedly in terms of s. 31 of the Administrator-General's Act, 1874 (Act No. II of 1874).

The clause in question enacts that "any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which the property comprised in the probate or letters of administration is situate, by an instrument in writing under his hand, bearing a stamp of ten rupees and notified in the local Gazette, transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General by his name of office."

The same section provides that, upon the instrument being duly executed and notified, the transferor shall be exempt from all liability for any act or omission after its date; and that the Administrator-General for the time being shall have the same rights and shall be subject to the same liabilities, which he would have had, and to which he would have been subject, if the probate or letters of administration had been granted to him by his name of office at the date of the transfer.

It is not matter of dispute that, if the executors and trustees of the late Nundo Lal Mullick are within the class of persons empowered by s. 31 to devolve their administrative functions upon the Administrator-General, the transfer was properly executed and notified, and must receive effect. The only question raised and discussed in the Courts below, and in the course of this appeal, has been whether the transferers, as the executors and trustees of a deceased Hindu, are private executors within the meaning of the clause.

The present suit was brought in September 1893 before the High Court, by Premlal Mullick, the adopted son and heir of the testator (hereinafter referred to as the respondent), by his [795] adoptive mother and next friend, Sreemutty Tregoona Sundery Dassee. The plaint contains a variety of conclusions, the first three of these being (1) for the administration of the testator's estate under the direction of the Court; (2) for the appointment of a Receiver pending the final determination of the suit; and (3) for an injunction restraining the Administrator-General from taking possession of or interfering with the estate. The testamentary executors and trustees of the deceased and the Administrator-General were called as defendants.

Mr. Justice Sale, who tried the suit, found by a decree, dated the 21st December 1893, that the transfer purporting to be made by the executors and trustees to the defendant, the Administrator-General, on the 14th August 1893, was invalid; and he appointed a Receiver of the moveable property, and of the rents, issues and profits of the immoveable property belonging to the estate of the deceased. On appeal, his decision was affirmed by the majority of the Court, consisting of Prinsep and Trevelyan, JJ., Petheram, C.J., dissenting. The present appeal has been brought by the Administrator-General against these judgments. The executors and trustees, although called as respondents, have made no appearance.

Their Lordships have been unable to adopt the construction of s. 31 of the Act of 1874, which commended itself to the majority of the learned Judges. The right view of the Statute was, in their opinion, expressed by the Chief Justice.

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The clause in question is a re-enactment, without verbal alteration, of s. 30 of the Administrator-General's Act, 1867 (Act No. XXIV of 1867). At the time when that Act passed, the executor of a Hindu estate could not have availed himself of the provisions of s. 30. His powers and functions were not those of an English executor, but rather those of a manager; he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered. Accordingly he was not, within the meaning of s. 30, a private executor or administrator who could transfer to the Administrator-General any estates "vested in him by virtue of such probate or letters."

[796] A very important change was made in the law by the Hindu Wills Act, 1870 (Act No. XXI of 1870), which, *inter alia*, enacted that certain portions of the Indian Succession Act of 1865 (Act No. X of 1865) should apply to all wills and codicils made by any Hindu on or after the 1st day of September 1870. Amongst the clauses thus applied were ss. 179 to 189, both inclusive, which make provision for the granting of probate and letters of administration. It is sufficient for the purposes of this case to refer to two of these clauses. Section 181 is to the effect that probate can be granted only to an executor appointed by the will. Section 179 provides that the executor or legal administrator, as the case may be, of a deceased person, shall be his legal representative for all purposes, and that all the property of the deceased person shall vest in him as such.

It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The will of the late Nundo Lal Mullick was executed in August 1889, and his executors, therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease.

The right to devolve the property of a deceased testator, with all powers and duties relating to its management and administration, which is conferred by s. 31 of the Act of 1874, is not confined to any particular class of executors or of estates. It is given, in broad and comprehensive terms, to any and every testamentary executor, in whom the estates of the deceased testator have been legally vested by virtue of his probate. The clause only attaches one condition to the exercise of the executor's right, which is, that no transfer shall be made to the Administrator-General without his consent. It is left to the discretion of that official to determine whether the property falling under the will, and the trusts which it creates, are of such a character that he ought to undertake the duty of administration.

In these circumstances, it appears to their Lordships that the [797] executors and trustees of Nundo Lal Mullick were, according to the very letter of the enactment, persons having power to transfer the estates vested in them, in that capacity, to the Administrator-General, under the provisions of s. 31. Indeed it was hardly disputed, in the argument for the respondent, which, to a great extent, consisted in a repetition of the reasons assigned for their judgments by the Courts below, that, if s. 31 be taken *per se*, no other result could follow. But it was maintained that, although the language of the clause is framed in such general terms as to include every executor who has obtained a grant of probate

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under the 179th and following sections of the Indian Succession Act of 1865, it must nevertheless be held to exclude the executor of a Hindu will, because it appears *aliunde* that the Legislature so intended. It is conceivable that the Legislature, whilst enacting one clause in plain terms, might introduce into the same Statute other enactments which to some extent qualify or neutralise its effect. But a positive enactment in a Statute of 1874 cannot be qualified or neutralized by indications of intention gathered from previous legislation upon the same subject. And there is no legislation, subsequent to that of 1874, with respect to the power of an executor to make over his office with all its rights and liabilities to the Administrator-General.

One of the arguments, if not the main argument, urged for the respondent was, that s. 30 of the Administrator-General's Act of 1867 at no time conferred any right of transfer upon the executor of a deceased Hindu; and that s. 31 of the Act of 1874, which was a consolidating Statute, merely re-enacted the provisions of s. 30, and was neither intended nor could be held to have a wider effect. The argument rests upon two assumptions which do not appear to their Lordships to be well founded. Section 30, at the time when it became law, had no application to a Hindu executor, who, as the law then stood, had no estate vested in him which he could transfer. But a Hindu executor who, prior to the Act of 1874, obtained probate and had the estate vested in him, by virtue of the Hindu Wills' Act of 1870, was in a very different position. He answered the description given in s. 30 of the persons who were entitled to transfer; and, apart from a clause in the Act of 1870 which they [798] will shortly notice, their Lordships see no reason why he should have been deprived of the benefit of its provisions. Assuming, however, the argument to be so far well founded, it does not follow that the Hindu executor is not within the ambit of s. 31 of the Act of 1874. The respondent maintained this singular proposition, that, in dealing with a consolidating Statute, each enactment must be traced to its original source, and when that is discovered must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed.

The respondent relied upon the terms of s. 5 of the Hindu Wills Act of 1870, which provides that "nothing contained in this Act shall affect the rights, duties and privileges of the Administrators-General of Bengal, Madras and Bombay, respectively." It is by no means clear that a reservation in these terms was meant to have the effect of precluding the Administrator-General from accepting, if he thought proper, the devolution upon him of the administration of a Hindu succession, under s. 30 of the Act of 1867. But it does not appear to their Lordships to admit of doubt that the reservation cannot control the powers given to the Administrator-General by the Act of 1874.

Another argument for the respondent was based upon the enactments of ss. 16 and 17 of the Act of 1874. The first of these sections empowers the Administrator-General to apply for letters of administration to the estate of a deceased person who leaves assets exceeding the value of Rs. 1,000, either generally or with a will annexed, if no person appears to claim the right to administer within a month after the death; but Hindu estates are expressly exempted from its operation. On the other hand, s. 17

empowers the Court to make an order, at the instance of parties interested, or of the Administrator-General, directing the Administrator-General to apply for letters of administration of the effects of any [799] deceased person, Hindus included, in cases where it is shewn, to the satisfaction of the Court, that danger is to be apprehended of the misappropriation, deterioration, or waste of the assets, unless such letters of administration are granted. These enactments do not appear to their Lordships to conflict with the provisions of s. 31. Section 17 gives the Administrator-General no right, or excludes his right, to take up, at his own hand, the administration of the estate of a Hindu, who has died testate or intestate, which is not in danger; whilst, if the estate be in danger, he may be directed by the Court to do so, at his own instance, or at the instance of parties interested in the succession. It appears to their Lordships to be impossible to derive from these provisions an inference that the Legislature cannot have intended to allow the Administrator-General to become the administrator of a Hindu estate, at the request of the executors, at all events an inference so strong as to override the plain enactments of s. 31.

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It was also maintained that the Legislature cannot have intended that, in any circumstances, the Administrator-General should have the duty imposed upon him of carrying out the trusts of a Hindu will, which might probably or possibly involve the execution of religious trusts, with which a public official ought to have no concern. The answer to that argument is twofold. In the first place, the administrator may have that duty imposed upon him by the Court, in cases where there is no existing administration, and the estate is in danger of being dilapidated. In the second place, s. 31 does not impose upon him the duty of administering any estate, whether Hindu or not, in any case where he is not requested to do so by the acting executors, and where the purposes of the will are in his judgment such as ought not to be executed by an official in his position.

Their Lordships observe that the two learned Judges who constituted the majority in the appellate Court, although they do not base their judgments upon them, refer to the proceedings of the Legislature which resulted in the passing of the Act of 1874 as legitimate aids to the construction of s. 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations [800] when the clauses of an Act of the British Legislature are under construction, are equally cogent in the case of an Indian Statute.

Their Lordships will humbly advise Her Majesty to reverse the decrees appealed from, to dismiss the suit, and to direct that the costs of both parties in the Courts below, as between solicitor and client, shall be paid out of the estate of the deceased. The costs of this appeal must be borne by the estate in like manner.

Appeal allowed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondent, Premlal Mullick: Messrs. *T. L. Wilson & Co.*

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APPELLATE CIVIL.

22 C. 800.

22 C. 800.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Stevens.

GOPI NATH BAGDI AND OTHERS (*Plaintiffs*) *v.* ISHUR CHANDRA BAGDI AND OTHERS (*Defendants*).*
[28th May, 1895.]

Co-sharers—Bengal Tenancy Act (*VIII of* 1885), ss. 171, 174—*Payment of decretal amount by one co-sharer to set aside sale, Effect of—Charge.*

Where the plaintiffs and defendants were co-tenants of certain *jotes* which were sold by auction in execution of a decree for rent, and the plaintiffs, by paying the decretal amount and auction-purchasers fees under s. 174, Bengal Tenancy Act, had the sale set aside,

Held, that the plaintiffs did not by such payment acquire a charge on the shares of their defaulting co-tenants. *Kinu Ram Das* v. *MoZaffer Hosain Shaha* (1) followed.

[R , 5 C.L.J. 315 = 11 C.W.N. 403 (413) = 15 C.W.N. 782 = 11 Ind. Cas. 501 ; 12 C.W. N. 231 N.]

THE plaintiffs and defendants were co-tenants in two *jotes* held under their talukdar, Rajani Kanta Dutta, who obtained a decree against them for rent, in execution of which the defaulting *jotes* were sold by auction. The plaintiffs, under the provisions of s. 174 of the Bengal Tenancy Act, paid into Court the sum of Rs. 170-9½ in liquidation of the decretal amount, and the sum of **[801]** Rs. 15-5 for payment to the auction-purchaser ; and the auction sale was accordingly set aside. The present suit was brought by the plaintiffs for contribution, and for a declaration that the plaintiffs had acquired a charge on the shares of their defaulting co-sharers for their proportion of the amount paid on their behalf by the plaintiffs. It was held by the Subordinate Judge of Burdwan (affirming the decision of the Court of first instance) that the said payment by the plaintiffs to have the sale set aside gave them no charge on the shares of their co-sharers. From this decision the plaintiffs brought this appeal to the High Court.

Babu *Bepin Behary Ghose* (Jr.), for the appellants.—The plaintiffs paid the entire amount of the money payable by them and their co-sharers, the defendants, in order to protect the holdings from being sold under the rent decree. The defendants have been immensely benefited by this payment. But for this the rights of the co-sharers in the property would have been extinguished. I contend that this payment being necessary to save the interests of the co-sharers in the holdings gives the plaintiffs a charge on the share of each of the defendants for the proportion of the decretal amount payable by such defendant. By s. 171 of the Bengal Tenancy Act the proportion of the amount payable by the defendants should be deemed to be a debt secured by a mortgage of the shares of the defendants in the holdings.

Babu *Hara Chandra Chakravarti*, for the respondents.—There is no charge on the shares of the co-sharers. The Full Bench have decided in *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) that there is no general rule of equity to the effect that whoever, having an interest in an estate, makes a

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* Appeal from Appellate Decree No. 1192 of 1894, against the decree of Babu Rajendro Kumar Bose, Subordinate Judge of Burdwan, dated the 23rd of April 1894, affirming the decree of Babu Loke Nath Nundy, Munsif, First Court, Burdwan, dated the 15th of June 1893.

(1) 14 C. 809.

payment in order to save the estate, obtains a charge on the estate. Section 171 does not apply, for the payment described in that section is one made before sale and not after sale as in s. 174. Besides, s. 174 gives no such charge, and therefore it must be taken that the Legislature intended that there should be none.

JUDGMENT.

The judgment of the Court (PIGOT and STEVENS, JJ.) was delivered by

PIGOT, J.—As to the general principle upon which the learned pleader for the appellant stated the case to us, we think we are [802] bound by the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1) which we are unable to distinguish in principle from the case made on behalf of the appellants ; and we think that a payment of a nature so peculiar as that under s. 174 would need some indication in the Act itself in connection with that section before we should feel at liberty to accede to the appellants' contention by declaring that, besides their right to contribution personally, they had also a right to a charge on the property so far as the shares of their co-tenants are concerned for the amount paid by them under the provisions of that section. There is nothing in the section which contemplates any such right or privilege on the part of the person paying, and we do not think we should add such a provision as that to s. 174.

We therefore dismiss the appeal with costs.

F. K. D. *Appeal dismissed.*

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22 C. 802.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

AUBHOYA DASSI (*Decree-holder*) v. PUDMO LOCHUN MONDOL, *Judgment-debtor* and ANOTHER (*Petitioner*).* [10th June, 1895.]

Sale for arrears of rent—Civil Procedure Code (*Act XIV of* 1882), *ss.* 311 *and* 312—*Application to set aside a sale of a tenure by a purchaser from the judgment-debtor prior to attachment—Second appeal—Order setting aside sale—Civil Procedure Code*, *s.* 622.

A person who claims to be a purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent, is entitled to apply under s. 311 of the Code of Civil Procedure to set aside the sale. *Asmutunnissa Begum* v. *Ashruff Ali* (2) distinguished.

No second appeal lies from an order under s. 312 of the Code setting aside a sale [*Nana Kumar Roy* v. *Golam Chunder Dey* (3) followed] and the Court refused under the circumstances to interfere under s. 622.

[F., 28 C. 4=5 C.W.N. 124.]

THIS appeal arose out of an application by the purchaser of a tenure from the judgment-debtor to set aside a sale of the tenure [803] under s. 311 of the Code of Civil Procedure. One Pudmo Lochun Mondol purchased a tenure from one Digambur Dako, the judgment-debtor, on the 20th March 1893. The zemindar on the 25th June 1892 obtained

* Appeal from Order No. 311 of 1894, against the order of H. W. C. Carnduff, Esq., Officiating Additional District Judge of 24-Pergunnahs, dated the 4th of August, 1894, affirming the order of Babu Hurro Mohun Bose, Additional Munsif of Diamond Harbour, dated the 5th of June 1894.

(1) 14 C. 809. (2) 15 C. 488. (3) 18 C. 422.

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a decree for rent against the said Digambur Dako, and in execution of that decree she sold the tenure of the judgment-debtor, and purchased it herself on the 27th November 1893. On the 8th January 1894, Pudmo Lochun Mondol made an application to set aside the sale under s. 311 of the Code of Civil Procedure. The Court of first instance set it aside, and on appeal the District Judge confirmed that order.

Against this order the decree-holder appealed to the High Court.

Babu *Nil Madhub Bose* and Babu *Satis Chunder Ghose*, for the appellant.

Babu *Harendra Narayan Mittra*, for the respondent.

Babu *Harendra Narayan Mittra* took a preliminary objection that, under s. 588 of the Code of Civil Procedure, no second appeal would lie against an order setting aside a sale. See *Nana Kumar Roy* v. *Golam Chunder Dey* (1).

Babu *Nil Madhub Bose*, for the appellant, contended that, under s. 244 of the Code, the decree-holder being the purchaser, a second appeal would lie. Assuming that there was no second appeal, he also contended, relying upon the Full Bench case of *Asmutunnissa Begum* v. *Ashruff Ali* (2), that, as the petitioner was a purchaser from the judgment-debtor, he had no *locus standi* to come in under s. 311 of the Code, and therefore the Court below had no jurisdiction to entertain his application and set aside the sale. The Court ought, therefore, to interfere under s. 622 of the Code.

Babu *Harendra Narayan Mittra* in reply.—The case of *Asmutunnissa Begum* v. *Ashruff Ali* (2) does not really affect the position of the petitioner. The tenure has been sold for its own arrears, the purchaser has got it free from all encumbrances (see ss. 159 and 161 of the Bengal Tenancy Act) ; therefore the property of the petitioner had been sold, and his interest in the land has been legally affected. The case of *Panye Chunder Sircar* v. *Hur* **[804]** *Chunder Chowdhry* (3) referred to, with approval by Ghose, J., in the case of *Abdul Gani* v. *Dunne* (4) supports this position.

The judgment of the Court (PETHERAM, C. J. and BEVERLEY, J.) was as follows :—

JUDGMENT.

This is a second appeal from an order setting aside a sale in execution of a decree.

The order in question purports to have been made under s. 312 of the Code, and a preliminary objection has been raised that, under the provisions of the last paragraph of s. 588, no second appeal will lie. This was decided by a Full Bench in the case of *Nana Kumar Roy* v. *Golam Chunder Dey* (1). The learned pleader for the appellant accordingly asks us to treat the appeal as an application under s. 622 of the Code, on the ground that the lower Courts had no jurisdiction to make and affirm an order under s. 312, inasmuch as the petitioner was not a person who was competent to apply to have the sale set aside under the provisions of s. 311. In support of this contention, the learned pleader relies on the decision of the Full Bench in the case of *Asmutunnissa Begum* v. *Ashruff Ali* (2).

The facts appear to be briefly as follows : The decree, in execution of which the tenure was sold, was a decree for arrears of the rent of the tenure itself, and was made on 25th June 1892. On 20th March 1893, the judgment-debtor sold the tenure to the petitioner. On 21st July 1893, application was made by the decree-holder to execute the decree, and on

(1) 18 C. 422. (2) 15 C. 488. (3) 10 C. 496. (4) 20 C. 418.

27th November the tenure was put up to sale and purchased by the decree-holder himself. **1895 JUNE 10. — APPELLATE CIVIL. — 22 C. 802.**

The tenure itself having been put up to sale in execution of a decree for arrears of the rent thereof, we are of opinion that the Full Bench case of *Asmutunnissa Begum* v. *Ashruff Ali* (1), which is relied on, will not apply, and that the petitioner's property having been sold, he was a person entitled to apply to have the sale set aside under s. 311 of the Code—*Panye Chunder Sircar* v. *Hur Chunder Chowdhry* (2). That being so, the lower Courts had jurisdiction to entertain the application under s. 311.

[805] Nor, we may add, does the appellant appear to us to be entitled to any relief upon the merits. It appears that, about a month after his purchase, the petitioner executed a *kabuliat* for this tenure in favour of the appellant, as well as a *kistbandi* for Rs. 270 on account of arrear rents, and it is alleged that the petitioner, after the sale, paid to the appellant Rs. 95 out of the first instalment due in February 1894. The *kistbandi* is silent as to the decree, but there can be little doubt that it was intended to supersede it. It is found by both the lower Courts that the sale was a fraudulent one, and carried out without the knowledge of the petitioner. Under these circumstances, we think there is no ground for our interference under s. 622.

The appeal is dismissed with costs.

S. C. G. *Appeal dismissed.*

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22 C. 805.

APPELLATE CRIMINAL.

Before Mr. Justice Norris and Mr. Justice Beverley.

DEWAN SINGH AND OTHERS *v.* THE QUEEN-EMPRESS.*
[8th January, 1895.]

Conviction—Sentence—Discretion of Court as to punishment after conviction of murder—Opinion of committing Magistrate. Reference to by Sessions Judge in his judgment.

The law gives no discretion to a Court which convicts of an offence to award or not the punishment provided for that offence in the Penal Code. When convicting of murder, the only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded, regard being had to the circumstances of the particular case.

On a case the decision of which is vested by law in him sitting with assessors, a Sessions Judge is bound to form his own opinion, aided by the assessors indeed, but quite independent of any expression of opinion on the part of the committing Magistrate. The Judge's reference in his judgment to the opinion of the committing Magistrate was held to be wholly irrelevant and wrong.

On the morning of the 18th of June 1894 a riot took place in Gopalpur, in the district of Gya, in the course of which one Kali Singh was killed and Nemdhari Singh and others were **[806]** hurt. All the accused persons, namely (1) Dewan Singh, (2) Nag Singh, (3) Bhairo Singh I, (4) Harbuns Singh, (5) Harkat Singh, (6) Bhairo Singh II, (7) Madho Singh, and (8) Ishur Singh were charged with having committed offences under s. 148, s. 302 read with s. 149, and s. 326 read with s. 149, of the Penal Code. All of them were satisfactorily proved to have taken part in the riot. The assessors found all the accused guilty under the first

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* Criminal Appeal No. 863 of 1894, against the order passed by H. Holmwood, Esq., Officiating Sessions Judge of Gya, dated the 11th day of November 1894.

(1) 15 C. 488. (2) 10 C. 496.

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charge, but not guilty under the other two charges, because they could not implicate any of them in the injuries caused either to Kali Singh or to Nemdhari Singh. The Sessions Judge, however, found all the accused guilty on all three charges, but as he found that certain only of the accused, namely, Dewan Singh, Bhairo Singh I, and Harkat Singh were directly implicated in causing the death of Kali Singh, he sentenced those persons only to transportation for life under s. 302 read with s. 149 of the Penal Code, passing no sentence on them in respectof the other charges; similarly, the Sessions Judge found that certain others of the accused, namely, Harbuns Singh, Bhairo Singh II and Ishur Singh were directly implicated in the grievous hurt caused to Nemdhari Singh, and sentenced them to seven years' rigorous imprisonment under s. 326 read with s. 149 of the Penal Code, and to three years in addition under s. 148, but passed no sentence on them under s. 302 of the Penal Code. The other two accused, namely, Nag Singh and Madho Singh, were sentenced only to three years' rigorous imprisonment under s. 148, but no sentence was passed on them in respect of the other two charges. All the accused appealed to the High Court.

Mr *C. P. Hill* and Babu *Atulya Charan Bose*, appeared for the appellants.

The Junior Government Pleader (Babu *Ram Churn Mitter*), appeared for the Crown.

The arguments on the merits of the case are unnecessary for the purposes of this report.

The judgment of the High Court (NORRIS and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

In this case the following eight persons, namely, (1) Dewan Singh, **[807]** (2) Nag Singh, (3) Bhairo Singh I of Gothuni, (4) Harbuns Singh, (5) Harkat Singh, (6) Bhairo Singh II of Kansara, (7) Madho Singh, and (8) Ishur Singh have been convicted of being concerned in a riot, in which one man Kali Singh was killed and Nemdhari Singh and several others were wounded. They were all charged with having committed offences under (1) s. 148; (2) s. 302/149; (3) s. 326/149, the murder charge being in respect of the death of Kali Singh and the grievous hurt that was caused to Nemdhari Singh. The assessors found all the accused guilty under the first charge but not guilty under the other two charges, because they could not implicate any of them in the injuries caused either to Kali Singh or to Nemdhari Singh. The Sessions Judge, on the other hand, has found all the accused guilty on all three charges, but as he finds that certain only of the accused, *viz.*, Dewan Singh, Bhairo Singh I, and Harkat Singh, were directly implicated in causing the death of Kali Singh, he sentences those accused only to transportation for life under s. 302/149, passing no sentence on them in respect of the other charges; similarly, he finds that certain others of the accused, *viz.*, Harbuns Singh, Bhairo Singh II and Ishur Singh, were directly implicated in the grievous hurt caused to Nemdhari Singh, and he sentences those accused to seven years' rigorous imprisonment under s. 325/149, or s. 326/149 (it is not clear which), and to three years in addition under s. 148, but he passes no sentence on them under s. 302/149. The other two accused, *viz.*, Nag Singh and Madho Singh, he sentences only to three years' rigorous imprisonment under s. 148, passing no sentence on them in respect of the other two charges. The result is that in respect of two of the accused, the Sessions Judge has sentenced them under s. 148 only, though he has found them guilty of graver charges

under ss. 302/149 and 326/149, and as regards three others he has passed no sentence under s. 302/149, though he has found them guilty of murder under that section.

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[The learned Judges after dealing with the facts of the case and acquitting Madho Singh, accused No 7, as it was not shown that he took any active part in the riot, continued :—]

The next question is, what offences have the rest of the **[808]** accused committed, and what are the proper sentences that should be imposed on them ? The Judge, as we have said, has found that by virtue of s. 149 of the Penal Code the accused are all guilty of murder, and of voluntarily causing grievous hurt, as well as of the minor offence of rioting armed with deadly weapons.

On the question of sentence, the Sessions Judge remarks as follows : "In a recent case decided by me at Sessions, I held, following the Full Bench decision in *Nilmony Poddar* v. *Queen-Empress* (1), that I could not convict persons who were not actually implicated in the offences charged under s. 149 in addition to the offence charge under s. 148. Their Lordships, Petheram, C. J., and Beverley, J., however, pointed out to me that under that ruling it was not the conviction, but the separate sentence which was declared illegal. I now see that I was wrong in my previous finding, but a further and very grave difficulty presents itself in this case, for which, as far as I know, there has been no authoritative decision. This is that when it becomes the duty of the Court to sentence a batch of rioters under s. 302 read with s. 149, the least sentence it can pass under that section is transportation for life. Can the Court convict, and sentence on the first count and on any other count decline to pass any sentence? As I read the ruling in *Nilmony Poddar* v. *Qeeen-Empress* (1), the Court can give the sentence either under s. 148 or under s. 149 read with some other section, but not under both, unless the prisoner is individually implicated in the further act charged under s. 149. Am I, therefore, at liberty to sentence under s. 148 and ignore the minimum penalty under s. 302 ? I come to the conclusion with much hesitation that I am in the case of those prisoners who are not implicated in the specific offence of murder. I agree with the assessors that in this case both the offences of murder and grievous hurt, with deadly weapons, were committed in prosecution of the common object of the unlawful assembly; and I am, therefore, bound to convict all the accused who are convicted under s. 148 under s. 302 read with s. 149, **[809]** and also under s. 326 read with s. 149. In the ordinary way, if a prisoner were convicted before me under s. 148 and 326 read with s. 149, I should inflict the necessary sentence under the graver charge alone if the punishment therefor provided were in my opinion sufficient ; but in this case I consider it best to pass separate sentences on those implicated in causing grievous hurt to Nemdhari Singh, so as to avoid the difficulty of passing sentence under s. 326 alone on prisoners who have also been convicted under s. 302. I shall, therefore, sentence Bhairo Singh of Gothuni, Harkat Singh and Dewan Singh under s. 302 alone, since it would be futile to sentence them under both ss. 148 and 302. Harbuns Singh, Bhairo Singh II, and Ishur Singh will be sentenced under both ss. 148 and 326 read with s. 149, and Madho Singh and Nag Singh under

(1) 16 C. 442.

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s. 148 only. As the unfortunate death of Kali Singh was wholly unpremeditated, and his assailants are not really more guilty than those who might have just as probably caused the death of Nemdhari, I shall pass the minimum sentence I am empowered by the law to pass under s. 302, and shall pass the extreme sentence under ss. 148 and 325 read with s. 149 on those implicated in the assault on Nemdhari Singh, since it is not clearly shown that these men used anything but *lathis*. The other two can only be punished with the extreme sentence under s. 148."

We are of opinion that the Sessions Judge has fallen into a most grave error in this passage of his judgment. Having found all the accused guilty under s. 302 of the Penal Code, he was bound by law to sentence them for that offence. Section 302 enacts that "whoever commits murder *shall be punished with death or with transportation for life*, and shall also be liable to fine," and there is no provision of law authorizing a Court to refrain from passing the sentence provided by the Code. If, therefore, the offence which the appellants have committed is murder, they must be sentenced to one or other of the punishments provided by s. 302. It cannot be contended that the law gave a discretion to a Court which convicts of that offence to award or not the punishment provided for it. The only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded, [810] regard being had to the circumstances of the particular case. In the present case, therefore, if we are of opinion that the finding of the Sessions Judge can be affirmed, and that all the accused are guilty of murder, it will be our duty under the provisions of s. 439 of the Code of Criminal Procedure to call upon such of the accused as have not been sentenced for that offence to show cause why they should not be so sentenced. It is necessary, therefore, to examine in some detail the facts and circumstances upon which the Judge has come to that finding.

In dealing with this matter, the Judge says as follows: "Now comes the question whether the acts, which resulted in the death of Kali Singh, amount to murder. The assesors and the committing Magistrate have found that they do, and the latter has given strong reasons for his finding. The assault on the deceased Kali Singh was undoubtedly pre-meditated, though I do not imagine the rioters originally intended to kill him. The assault was undoubtedly done with the intention of causing bodily injury to Kali Singh, and the bodily injury intended to be inflicted must, as the Joint Magistrate points out, be deemed to be that which was inflicted, since the rioters used *gurasas* and *lathis* with deadly violence on the head, body and limbs of Kali Singh, without care or restraint of any kind. This bodily injury was, as the Civil Surgeon shows, sufficient in the ordinary course of nature to cause death, and I am, therefore, bound under the terms of s. 149 of the Indian Penal Code to find all the rioters guilty of murder."

In the first place we must point out that the Judge's reference to the opinion of the committing Magistrate is wholly irrelevant, and should not have found a place in his judgment. The decision of the case is vested by law in the Sessions Judge sitting with assessors, and the Judge is bound to form his own opinion on it, aided by the assessors indeed, but quite independent of any expression of opinion on the part of the committing Magistrate. No doubt the Judge has formed his own opinion in the matter, and only seeks to fortify it by reference to the opinion of the Magistrate. But any such reference is not only out of place but wrong, inasmuch as the Magistrate was not present at the trial, did not hear what

the witnesses said in the Sessions Court, and had no jurisdiction whatever to come to any decision in the matter.

[811] In the passage just quoted, the Judge finds that, although the assault was premeditated, the rioters did not intend to kill Kali Singh, but that inasmuch as they intended to cause him bodily injury, such as was sufficient in the ordinary course of nature to cause death, they are guilty of murder. In a subsequent passage he remarks that "the unfortunate death of Kali Singh was wholly unpremeditated, and his assailants are not really more guilty than those who might have just as probably caused the death of Nemdhari."

Now, as we have already said, we have in this case only one story told, and that is the story for the prosecution. The accused do not attempt to set up a different state of facts; the defence in the case of the majority of them is that of an *alibi* which they have failed to substantiate. We must, therefore, accept the story told by the prosecution, and according to that story the accused went in a large body armed with *lathis* and *gurasas* to take forcible possession of land which had up to that time been in Nemdhari Singh's possession. Kali Singh was a brother of Nemdhari Singh, and had an interest in a small portion of the land which was grown with sugarcane. They and others of their relatives went to expostulate with the men who were ploughing up their land. Their case is that they went quietly, and it is not shown that they were armed or used any force. It does not appear that any one on the side of the accused was hurt in any way. On the other hand, brutal violence was used by the accused, a number of whom set upon Kali Singh and beat him to death. The medical evidence is thus summed up by the Judge:—

"The medical evidence discloses that Kali Singh's death was due to shock caused by excessive violence. He had many ghastly wounds, and the left temporal bone was dislodged, and there was effusion of blood on the brain, but the Civil Surgeon is unable to say which blow of the numerous ones showing externally caused these fatal symptoms. In addition to these, the left thigh bone, the left fifth rib, and the fifth metacarpal bone of the right hand were found fractured. Two of the wounds, one behind to left ear and one a punctured wound on the left upper arm, were probably caused by a pole-axe, the blade being apparently employed in the first **[812]** case, and the point in the second." Dr. Macrae's evidence as to the cause of death is in these words: "Death in my opinion resulted from shock from the numerous injuries which had apparently been inflicted with much violence. It is difficult to differentiate, because he had so many injuries on the head." From this evidence it is quite clear that Kali Singh was beaten to death by a number of persons armed with *lathis* and *gurasas* which were freely used upon his head and other parts of his person, and we quite agree with the Sessions Judge that all those who took a part in inflicting these injuries must have known that death was a probable consequence, and that the offence was murder. We think, too, that every member of that unlawful assembly, which went out armed with the object of taking possession of the land and repelling by force any resistance that might be offered must have known that murder was likely to be committed, and is, therefore, guilty of murder by virtue of the provisions of s. 149 of the Penal Code. There are numerous reported cases to this effect, and we see nothing in this case that would take it outside the scope of the section. On the contrary, it appears to us that the present case is one of the worst that has come before us, and there is no reason whatever why the principle of those decisions should not be followed.

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We accordingly dismiss the appeal of all the accused (except that of Madho Singh whom we have acquitted). We confirm the sentence of transportation for life that has been passed on Dewan Singh, Bhairo Singh I, and Harkat Singh, and we direct that notice be served on the accused Harbans Singh, Bhairo Singh II, Ishur Singh and Nag Singh to show cause why they should not also be sentenced for the offence of murder which they are found to have committed.

S. C. B.

22 C. 813.

[813] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

CHUNDRA NATH DEY AND ANOTHER (*Judgment-debtors*) *v.* BURRODA SHOONDURY GHOSE (*Decree-holder*).* [4th June, 1895.]

Execution of decree—Transfer of Property Act (*IV of* 1882), *ss.* 99 *and* 67*—Application for the attachment and sale of mortgaged property in execution of a decree obtained not in accordance with the Transfer of Property Act, though suit instituted after the passing of the Act.*

A mortgagee obtained a decree on the 15th February 1883 upon a mortgage bond, dated 18th January 1879. The decree simply provided that the plaintiff do obtain the amount of his claim, and that the mortgaged property should remain liable for the satisfaction of the debt. The judgment-creditor in execution of that decree sold one of the mortgaged properties, and afterwards assigned over the decree, and the assignee, on the 18th August 1894, applied for the execution of the decree by attachment and sale of another of the mortgaged properties.

Held on the objection of the judgment-debtors, that s. 99 of the Transfer of Property Act was applicable to the case, and that the mortgaged property could not be sold, unless a suit under s. 67 of the Act be brought, and the procedure prescribed by the Transfer of Property Act followed. The property, however, could be attached, as there is nothing in s. 99 prohibiting such attachment.

[F., 22 C. 903 (908); R., 22 A. 401 (403) = A.W.N. (1900) 131; 25 C. 262 (270); 35 C. 61 = 11 C.W.N. 1011 = 6 C.L.J. 320 (F.B.); 22 M. 372 (376); 31 M. 35 = 3 M.L.T. 107 = 17 M.L.J. 503; 18 Ind. Cas. 201 (203); 5 S.L.R. 71 (74) = 11 Ind. Cas. 192; D., 27 A. 450 = 2 A.L.J. 121 = A.W.N. (1905) 42; 24 C. 473 (489); 25 C. 580 (583); 26 C. 166 (169); 4 C.L.J. 533 (535).]

THIS appeal arose out of an application by the assignee of the decree-holder for the execution of the decree by attachment and sale of one of the mortgaged properties. Chundra Nath Dey and another executed a mortgage bond in favour of one Hurrish Chunder Shaha on the 18th January 1879. The property No. 5 (with other properties) was included in the mortgage bond, though it was then in the possession of one Haran Moni Dasi, but the judgment-debtors afterwards acquired ownership in it. Hurrish Chunder Shaha instituted a suit on the 11th January 1883, and obtained an *ex parte* decree on the 13th February 1883, which [814] was to the following effect: "The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at 6 per cent. per annum until the date of realization, and the mortgaged property to remain liable for the satisfaction of the debt, and the plaintiff

* Appeal from Order No. 223 of 1894, against the order of F. H. Harding, Esq., District Judge of Mymensingh, dated the 24th of April 1894, reversing the order of Babu Chuckradhur Prosad, Subordinate Judge of that district, dated the 17th of August 1893.

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to obtain interest." The judgment-creditor, Hurrish Chunder Shaha, after realizing a portion of the decretal amount by sale of a portion of the mortgaged property, transferred the decree to one Burroda Shoondury Ghose, who applied on the 18th August 1891 for the execution of the said decree by attachment and sale of property No. 5. The judgment-debtor objected to the execution, on the ground that there being no decree under the Transfer of Property Act the property could not be attached and sold. The Court of first instance allowed the objection of the judgment-debtor, and declared that the property could not be attached and sold, because s. 99 of the Transfer of Property Act was applicable to the case. On appeal the District Judge overruled the objection of the judgment debtor, holding that s. 99 did not apply to the case, and allowed execution to proceed. Against this order the judgment-debtors appealed to the High Court.

Mr. *C.P. Hill* and Babu *Jogesh Chunder Roy*, for the appellants.

Babu *Sreenath Das* and Babu *Govind Chunder Das*, for the respondent.

Mr. *Hill*, for the appellants, contended that in this case the suit was instituted and decree obtained after the Transfer of Property Act came into force. The decree was not in accordance with the provisions of that Act. There was no order for sale. It only directed that the mortgaged property should remain liable for the debt. The decree-holder cannot execute the decree without getting an order for sale under the Transfer of Property Act. The District Judge simply says that s. 99 of the Transfer of Property Act does not apply to the case, and he does not give any reason for it. The effect of the Judge's order is that the property will be sold without any account being taken. Section 2 of the Transfer of Property Act enacts that the Act shall not affect any right or liability arising out of a legal relation constituted before it comes into force, or any relief in respect of any right or liability. Where, however, a suit is brought [815] after the date of the Transfer of Property Act, for the foreclosure or sale under a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act; the procedure of Reg. XVII of 1806 not being saved by the Transfer of Property Act, s. 2, cl. (*c*). See *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (1). In the course of the argument the following cases were referred to: *Ikram Singh* v. *Intizam Ali* (2), *Kaveri* v. *Ananthayya* (3), *Sathuvayyan* v. *Muthusami* (4), *Durgayya* v. *Anantha* (5), *Baijnath Pershad Narain Singh* v. *Moheswari Persad Narain Singh* (6), *Umesh Chunder Das* v. *Chun Chun Ojha* (7), *Jadub Lall Shaw Chowdhry* v. *Madhub Lall Shaw Chowdhry* (8).

Babu *Sreenath Das*, for the respondent.—The main question is whether s. 99 of the Transfer of Property Act precludes the decree holder from executing his decree. It is submitted that s. 99 does not apply to the present case, as the decree-holder does not want to sell any of the mortgaged property, properly so called, and the mortgage was executed before the Transfer of Property Act came into operation. If, in fact, the decree be taken as a money decree, no difficulty can arise. The decree-holder is proceeding against a property which is not a mortgaged property. The judgment-debtors had no interest in the property at the time of the mortgage. The mere fact that they acquired a title to the land afterwards

(1) 12 C. 583. (2) 6 A. 260. (3) 10 M. 129. (4) 12 M. 325.
(5) 14 M. 74. (6) 14 C. 451. (7) 15 C. 357. (8) 21 C. 34.

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does not make it a mortgaged property. The decree-holder cannot bring a second suit for the declaration of his lien upon the terms of the Transfer of Property Act, as he has already obtained satisfaction. The cases cited by the other side do not apply, as in those cases the suits were not brought upon the mortgage bonds.

Mr. *Hill*, in reply.—To say that property No. 5 is not a mortgaged property is an after-thought. The decree-holder took advantage of s. 43 of the Transfer of Property Act.

The judgment of the Court (PETHERAM, C.J. and BEVERLEY, J.) was as follows:—

JUDGMENT.

[816] It is not necessary to go over the facts of this case, as they are fully stated in the judgments of the Courts below, and the only question we have to consider is whether a decree in this form, in a suit brought after the Transfer of Property Act came into operation, can be executed by sale of the mortgaged property.

The suit was upon a mortgage deed to recover the money secured by the deed upon mortgage of various properties, of which that now in question was one, though at the time of the mortgage this particular property was in the possession of a tenant for life, the mortgagor having, at that time, only a reversionary interest in it.

The operative part of the decree was as follows: "The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at 6 per cent. per annum until the date of the realization, and the mortgaged property to remain liable for the satisfaction of the debt, etc."

The Subordinate Judge thought that, as the property now attached was part of the property included in the mortgage, it could not, by reason of the provisions of s. 99 of the Transfer of Property Act, be brought to sale under the attachment without further proceedings under s. 67 of the Act.

The learned District Judge has formed a different opinion. He thinks that, although the decree was not either in form or in substance such a decree as could be passed in an action brought under s. 67, still the action was, in fact, brought under that section, and that for that reason s. 99 did not apply to the case.

We think that the view taken by the Subordinate Judge is the correct one. The objects of ss. 65, 86, 88 and 99 of the Act are to prevent mortgagees from realizing their securities, except in the way prescribed by the Act, and unless the action in which it is sought to realize the security is one in which the procedure followed is that prescribed by the Act, we think it is within the provision of s. 99, and that the mortgaged property cannot be sold in it. We accordingly set aside the order of the District Judge, and restore so much of that of **[817]** the Subordinate Judge as directed the case to be struck off, as the attached property cannot be sold in this execution proceeding. As, however, s. 99 does not provide that the mortgaged property shall not be attached, we do not restore so much of his order as directs that the property be released from attachment.

S. C. G. *Appeal allowed.*

22 C. 817.

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APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

QUEEN-EMPRESS *v.* RAZAI MIA.* [1st July, 1895.]

Confession—Criminal Procedure Code (*Act X of* 1882), s. 364—*Confession not recorded in language in which it is given, Admissibility of, in evidence—Unsoundness of mind —Penal Code* (*Act XLV of* 1860), s. 84.

The confession of an accused person made in Bengali, the language in which the accused was examined, was recorded in English. The committing Magistrate, in his evidence in Court, said that he could not write Bengali well, and that there was no *mohurrir* with him at the time when the confession was recorded.

Held, the provisions of s. 364 of the Criminal Procedure Code had been sufficiently complied with.

Jai Narayan Rai v. *Queen-Empress* (1) distinguished.

Where the unsoundness of mind deposed to was not such as would make the accused incapable of knowing the nature of the act, or that he was doing what was contrary to law, it was held to be insufficient to exonerate him from responsibility for crime under s. 84 of the Penal Code.

[F., 23 C 604 (609) ; R., 21 B. 495 (500) ; 17 C.P.L.R. 113 (117) ; 11 Cr.L.J. 105 (109) =4 Ind. Cas. 985=6 M.L.T. 101=94 P.L.R. 1909=16 P.W.R. 1909 Cr.]

THE accused was charged with having murdered his wife. He made a statement to Mr. Haliday, the Assistant Commissioner of Sylhet, in the following terms: "I was ill, I struck my wife with a *dao* on the head in the verandah of my house yesterday and killed her." The statement was made in Bengali, but recorded in English. The accused made his mark on the **[818]** record. It was not proved that any question was put to the accused. Mr. Haliday, who was examined in Court, said that he could not write Bengali well, and that there was no *mohurrir* with him at the time when the confession was recorded. It was alleged that the accused was not sane at the time when he committed the offence. The hospital assistant, who had seen the accused frequently during some weeks, deposed that he could find no sign of insanity, but remarked that the accused did not talk much. The facts which might give rise to doubts about the sanity of the accused were as follows: It did not appear that there was any motive for the act. The accused struck several blows, although one was sufficient to cause death. He did not attempt to escape or conceal what he had done. His behaviour, according to the evidence for the prosecution, had been very peculiar for some months. He had been silent and had not eaten regularly, nor done any work. The witnesses said he was mad.

From the above facts, as found by the Sessions Judge, he came to the conclusion that they did not prove that the accused was insane, though they did show that he was disturbed, unsettled and peculiar, and also held that the accused did know the nature of the act done by him; but having regard to the peculiar state of mind of the accused, he sentenced him to transportation for life.

The accused appealed against the above finding and sentence from the Sylhet jail.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

* Criminal Appeal No. 371 of 1895, against the order passed by R.H. Greaves, Esq., Sessions Judge of Sylhet, dated the 2nd of May 1895.

(1) 17 C. 862.

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JUDGMENT.

Two questions arise for consideration in this case :

First, whether the confession of the prisoner recorded by the committing Magistrate on the 7th of March 1895, which is the only important evidence against him, was recorded in the manner provided by s. 364 of the Code of Criminal Procedure, and was a true and voluntary confession ; and

Second, whether, if the murder is proved to have been committed by the prisoner, he is not exempted from criminal responsibility by reason of unsoundness of mind.

[819] Upon the first point, the only objection that can be raised against the admissibility of the confession is that it was not recorded in Bengali, the language in which the accused was examined, but was recorded in English. But the evidence of the committing Magistrate, who says that there was no *mohurrir* with him at the time when the confession was recorded, and that he cannot write Bengali well, shows that the provisions of s. 364 of the Criminal Procedure Code have been sufficiently complied with; and this distinguishes the present case from that of *Jai Narayan Rai* v. *Queen-Empress* (1). We, therefore, see no objection to the admissibility of the confession. We are also of opinion that it is a true and voluntary admission of guilt, and that taken along with the medical evidence, it is sufficient to shew that the act of the prisoner, if it is an offence at all, amounts to the offence of murder.

This brings us to the consideration of the second question. Now, though some of the witnesses for the prosecution say that the accused had before the murder been of unsound mind for some months and after the murder also he was not quite of sound mind, we agree with the learned Sessions Judge in holding that the kind of unsoundness of mind deposed to was not sufficient to exonerate the accused from responsibility for crime under s. 84 of the Indian Penal Code, which requires that the unsoundness of mind must be such as would make the accused incapable of knowing the nature of the act, or that he was doing what was contrary to law. It is for the defence to make out this ground of non-liability, and we do not think that it has been made out.

Under the circumstances of the case, we think the learned Sessions Judge was quite right in not passing the sentence of death.

We, therefore, see no reason for our interference in this case, and we must dismiss the appeal.

S. C. B. *Appeal dismissed.*

(1) 17 C. 862.

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[820] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

DUNIA LAL SEAL (*Plaintiff*) *v.* GOPI NATH KHETRY AND OTHERS (*Defendants*).* [21st May, 1895.]

Land Acquisition Act (X of 1870)*—Suit for compensation—Buildings on land—Ownership in land and buildings—Landlord and Tenant—Transfer of Property Act (IV of* 1882), *s.* 108, *cl.* (*h*).

A plot of land was acquired under Act X of 1870 for the construction of a road within the town of Calcutta; the tenants who had erected masonry buildings on portions of the land, and who were in possession at the time of the acquisition, claimed before the Collector the value of their interests; but the owner of the land claiming the whole of the compensation money, the matter was referred to the District Judge, who found that the lands were originally granted for building purposes, and allowed a share of the compensation money, *viz.*, the value of the buildings, to the tenants. On appeal to the High Court by the owner of the land on the ground that the respondents" tenures, which were of a temporary character, having come to an end when the land was acquired by the Municipality, the buildings standing on the land became his property and that the tenants were not entitled to compensation

Held that the Judge came to a right finding on the facts, and that the owner of the land was not entitled to the buildings erected by the tenants without being liable to pay them compensation, even if the tenancy had come to an end.

Held also, that as the land was acquired by the Corporation during the continuance of the lease, in the sense that the relationship of landlord and tenant was still subsisting between the parties, and having regard to s. 108, cl. (*h*) of the Transfer of Property Act, which applies to Calcutta as well as to the mofussil, the tenants were entitled to the compensation for the buildings.

Juggut Mohinee Dossee v. *Dwarka Nath Bysack* (1) distinguished.

[R., 22 B. 1 (15); 34 B. 618 (625)=12 Bom. L R 34=5 Ind. Cas. 621.]

THE facts of the case are shortly as follows: A plot of land, with buildings on it, was acquired, under Act X of 1870, for the purpose of making a road within the town of Calcutta. The admitted owner of the land was one Dunia Lal Seal. On a reference [821] by the Land Acquisition Collector to the Civil Court under s. 15 of the Land Acquisition Act (X of 1870), Dunia Lal Seal claimed the whole of the compensation money, whilst Gopi Nath Khetry and others claimed a share of the amount on the ground that their ancestors had erected buildings upon the land and they had been in possession thereof for a long time, on payment of a monthly ground rent. The District Judge of 24-Pergunnahs found that the land had been originally granted for building purposes, and awarded the value of the buildings to the said Gopi Nath Khetry and others. From this decision the owner of the land, Dunia Lal Seal, appealed to the High Court.

Mr. *P. O'Kinealy* and Mr. *McNair*, for the appellant.

Dr. *Rash Behary Ghose*, Babu *Sirish Chunder Chowdhry* and Babu *Sarat Chunder Rai*, for the respondents.

Mr. *O'Kinealy.*—The claimants are simply lessees of the land who built houses thereon. In Calcutta buildings belong to the owner of the land. In this case there is no suggestion— not a shadow of one—that the tenancy is a permanent tenancy. The original lease was a temporary lease, the term of which expired, and a fresh lease was taken by the

* Appeal from Original Decree No. 79 of 1893, against the decree of C.B. Garrett, Esq., District Judge of 24-Pergunnahs, dated the 16th of February 1893.

(1) 8 C. 582.

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ancestors of the claimants and the rent was enhanced from time to time. There was no subsisting lease at the time of the acquisition of the land. The claimants could only claim fifteen days' notice to quit. It has been held in the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) that the law of equity and good conscience is applicable in Calcutta, and not Hindu or Mahomedan law amongst the Hindus or Mahomedans respectively. That being so in the present case, the claimants are not entitled to the compensation for the buildings. There is no evidence of the fact that, when the claimants took the lease, it was agreed between the parties that the houses would remain the property of the tenants on the expiration of the lease. Whatever might have been the original lease, the lease having come to an end, the tenants are not entitled to the compensation claimed. There was no agreement between the parties that the houses should remain the property of the tenants even after the expiration of the [822] term of the lease, and even if there were any, that agreement ought to have been registered.

Dr. *Rash Behary Ghose*, for the respondents.—The case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) is distinguishable. It does not apply to the present case. It would have been applicable if in that case the purchaser from the widow had erected the building before the reversioners came into possession. In that case the building was erected after the land fell into the possession of the reversioners. In this case the tenants were in possession when the land was acquired. It has been held that where a landlord has not objected to buildings erected by a tenant for a period of twenty-five years, and during that time had received rent from the tenant, even if the Court were not justified in holding that the land had originally been granted for building purposes, the landlord would be precluded from ejecting the tenant without compensation. See *Yeshwadabai* v. *Ram Chandra Tukaram* (2). It has also been held that a tenant is entitled to remove the materials of a house built upon the land by him. See *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (3), *In the matter of the petition of Thakoor Chunder Paramanick* (4). The same rule has been incorporated in s. 108, cl. (*h*) of the Transfer of Property Act. Even supposing that the claimants were monthly tenants, yet, considering the fact that they would have remained tenants on the land but for the opening of the road, no jury would have come to the conclusion that the tenants had no interest at all. See *Ex parte Farlow, In the matter of the Hungerford Market Company* (5).

Mr. *O'Kinealy* in reply.—The case of *Ex parte Farlow* (5) relied on by the other side is not a case between a landlord and a tenant. To follow the principle as laid down in that case would be to make the landlord pay for his forbearance. The case of *In the matter of the petition of Thakoor Chunder Paramanick* (4) is one of Hindu law, so it does not apply to the present case. The [823] case of *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (3) is no authority after the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1). The manner in which s. 108 of the Transfer of Property Act has been drawn shows that it is not applicable to a case like the present. Things attached to the earth must be removed, if at all, during the continuance of the lease. Section 108, cl. (*h*) of the Transfer of Property Act does not apply in a case like this where there was a break of tenancy. Supposing the tenants had a right to take the

(1) 8 C. 582. (2) 18 B. 66. (3) 5 C. 688.
(4) B. L. R. Sup. Vol. 595=6 W.R. 228. (5) 2 B. & Ad. 341 (346).

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materials of the building, they had plenty of time to do it, and, not having done so, they are not now entitled to compensation. In order to make the owner of the land liable to pay for the money spent by a tenant in improving the land in the belief that he has a good title thereto, fraud and deceit on the part of the owner must be clearly proved: see *Langlois* v. *Rattray* (1). Here nothing of that kind has been proved.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

This is an appeal from a decree of the District Judge of 24-Pergunnahs apportioning the compensation money awarded for a plot of land, 9 Mullick's Street, Calcutta, acquired under Act X of 1870, for the construction of the Harrison Road.

The appellant is the owner of the land in question, and the respondents represent tenants under him who had erected masonry buildings on portions of the land. The tenants claimed before the Collector the value of their respective interests in the land, but as the owner claimed to be entitled to the entire compensation-money, the matter was referred to the Judge under s. 39 of the Act. The Judge has awarded to the respondents the value of the buildings which stood on the portions of the land occupied by them, and against this decree the owner appeals.

It is proved by the evidence that the respondents, or their predecessors in interest, have occupied portions of the land for many years, paying rent therefor to the appellant; that in one case forty years ago, and in the other twenty-five years ago, the [824] respondents, with the knowledge and permission of the appellant, erected masonry buildings on the land which they have since been letting out to tenants; that the respondents have no written leases, but that the rent has been varied from time to time, being fixed for short terms either by oral or written agreement between the parties. The respondents were thus in possession at the time the land was acquired by the Corporation.

Upon these facts the District Judge has found that the presumption arises that the lands were originally granted to the respondents for building purposes, and that they were entitled to hold them so long as they paid the rent which they agreed to pay. We think that these findings are borne out by the evidence, and under these circumstances we think that the respondents were clearly entitled to share in the compensation awarded for the land, though it may be open to question whether the mode in which the value of their interest has been ascertained was the correct one.

Mr. O'Kinealy on behalf of the appellant has contended that the respondents' tenures having come to an end when the land was acquired by the Corporation, the buildings standing on the land became the property of the owner of the land, and that the Judge was wrong in awarding the value of those buildings to the respondents. In support of this argument he has relied upon the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (2). In that case it was held that the purchaser of a Hindu widow's estate in land situated in Calcutta was not entitled to remove buildings erected by him on the land after the land fell into the possession of the reversioners. We think that that case is distinguishable from the present, inasmuch as at the time the land now in question was acquired by the Corporation, the respondents were actually in possession, whereas the *ratio*

(1) 3 C.L.R. 1. (2) 8 C. 582.

1895 MAY 21. — APPELLATE CIVIL. — 22 C. 820.

decidendi in the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) was based on the fact that the land had fallen into the possession of the reversioners. The learned Judges who decided that case certainly did not go so far as to hold that the buildings might not have been removed by the tenants of the limited estate while they were still in possession.

On the other hand, we have been referred to the ruling of a Full Bench of this Court *In the matter of the petition of Thakoor* [825] *Chunder Paramanick* (2), to the case of *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (3) and to that of *Yeshwadabai* v. *Ram Chandra Tukaram* (4).

The rule laid down by the Full Bench was based on the usages and customs of the country, and was stated in the following terms :—

"We think it clear that according to the usages and customs of the country, buildings and other such improvements made on land do not by the mere accident of their attachment to the soil become the property of the owner of the soil; and we think it should be laid down as a general rule that if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

In the case *of Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) the above rule was treated, not as a rule of Hindu law, but as a rule of equity and good conscience, applicable to the mofussil but not to Calcutta. Pontifex, J., pointed out that the rule laid down in Narada related to contracts for tenancies in which rent was paid, and did not apply to the case before him.

In the case of *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (3) Wilson, J., held that in a question of tenancy created by contract between Hindus the parties were governed by Hindu law, and that the rule laid down by the Full Bench would apply even in the town of Calcutta.

In the Bombay case, which related to land in the town of Bombay, the position of the plaintiffs was very similar to that of the respondents in the case before us. They had held the [826] land for some years and had been allowed to erect buildings upon it. The defendant then attempted to treat them as monthly tenants, gave them notice to quit and sought to eject them without any compensation whatever. The Court appears to have thought that Act XI of 1855 would apply to the case, but as the defendants in that case claimed to retain the possession of the land and not merely to receive compensation for the buildings, it was decided that even if the Court was not justified in holding that the land had been originally granted for building purposes, the defendant was precluded from ejecting the plaintiffs without compensation.

In the face of these authorities we should not be prepared to hold upon the authority of the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) that even had the tenancy been determined, the appellant in

(1) 8 C. 582. (2) B.L.R. Sup. Vol. 595=6 W.R. 228.
(3) 5 C. 688. (4) 18 B. 66.

the present case would have been entitled to the building erected by the defendants without being liable to pay them compensation.

The Transfer of Property Act (IV of 1882) applies to Calcutta as well as to the mofussil, and s. 108 of that Act provides that in the absence of a contract or local usage to the contrary the lessor and the lessee of immoveable property, as against one another, possess certain rights and are subject to certain liabilities therein specified, and among the rights of the lessee clause (*h*) provides "that the lessee may remove at any time during the continuance of the lease," all things which he has attached to the earth (see s. 3) provided he leaves the property in the state in which he received it. In the present case the land was acquired by the Corporation during the continuance of the lease in the sense that the relationship of landlord and tenant was still subsisting between the parties, and that being so, the respondents were, we think, entitled to the compensation for the buildings which was paid by the Corporation.

It is possible indeed that the tenants might have been found to be entitled to a larger amount of the compensation awarded had their claim been enquired into on a different basis, but as apparently they limited their claim before the District Judge to the estimated value of the buildings, it was not competent to the [827] lower Court to award them anything in excess of those amounts. As a matter of fact the appellant has been awarded the sum of Rs. 52,778-1-0 and the respondents the sum of Rs. 2,899 and Rs. 1,185, respectively. The proceedings on the record do not show how the total compensation money amounting to Rs. 56,864-1-0 was ascertained, but upon the evidence on the record we cannot but think that the respondents' interests in the lands have been cheaply purchased at the sums awarded to them.

We must accordingly dismiss this appeal with costs.

Appeal dismissed.

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22 C. 827.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

AGHORE KALI DEBI (*Judgment-debtor*) *v.* PROSUNNO COOMAR BANERJEE AND OTHERS (*Decree-holders*).* [28th May, 1895.]

Limitation Act (XV of 1877), sch. II, *art.* 179, *cl.* 4—*Application to receive poundage fee—Application for the return of a decree partially executed by the Court where transferred for execution—Civil Procedure Code (Act* XIV *of* 1882), *s.* 223—*Step-in-aid of execution of a decree.*

Neither an application by a decree-holder to receive poundage fees from him in respect of some of his judgment-debtor's property purchased by himself, nor an application, for the return to the decree-holder of a decree, made to a Court to which it has been transferred for execution, and by which it has been partially executed, is a step-in-aid of execution within the meaning of the Limitation Act, sch. II, art. 179, cl. 4.

Krishnayyar v. *Venkayyar* (1) distinguished.

[Diss., 27 C. 709 (711); F., 23 B. 311 (313); 23 C. 196 (199); R., 6 M.L.J. 23 (24); 1 N.L.R. 61 (64).]

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* Appeal from Order No. 213 of 1893, against the order of T. D. Beighton, Esq., District Judge of 24-Pergunnahs, dated the 4th of April 1893, reversing the order of Babu Shoshi Bhushun Bose, Munsif of Baruipore, dated the 10th of December 1892.

(1) 6 M. 81.

1895 MAY 28. — APPELLATE CIVIL. — 22 C. 827.

PROSUNNO COOMAR BANERJEE and another obtained a mortgage decree against Srimati Aghore Kali Debi on the 17th December 1887 in the Munsif's Court of Baruipore. The decree-holders made an application for the execution of his decree in the said Court in 1888. The decree was subsequently transferred for execution to the Munsif's Court at Alipore. On the 26th September 1888 they made an application for execution to the latter Court, [828] and certain property belonging to the judgment-debtor was sold, and it was purchased by them, and, on the 9th February 1889, they put in the usual poundage fee, and on the 24th January 1893 the execution case was struck off. On the 9th March 1889 they made an application to the same Court to the following effect: "As the entire amount due to your petitioners has not been realized, they beg to file this petition, and pray that the Court will be pleased to return to them the decree put into execution. The said decree is required for taking out execution in the Munsif's Court at Baruipore."

The judgment-debtor objected to the execution of the decree on the ground of limitation. The Court of first instance held that the application was barred. On appeal, the learned District Judge of 24-Pergunnahs, relying upon the case of *Krishnayyar* v. *Venkayyar* (1), overruled the objection of the judgment-debtor, and held that the application was within time. He, however, held that the application, paying in the poundage fee, was not a step-in-aid of execution.

Against this order the judgment-debtor appealed to the High Court.

Babu *Lal Behary Mitter* and Babu *Promotha Nath Sen*, for the appellant.

Dr. *Ashutosh Mookerjee*, for the respondents.

Babu *Lal Behary Mitter.*—The case of *Krishnayyar* v. *Venkayyar* (1) is not against me. It rather supports my contention, as it lays down that in order to take advantage of art. 179, cl. (4) of the Limitation Act, some order of the Court, in furtherance of the execution, is necessary. In that case an application was made to return the decree to the Court which passed it, and therefore that was held to be a step-in-aid of execution.

In the present case only an application was made to return the decree to the judgment-creditor, and that cannot be considered to be a step-in-aid of execution within the meaning of the Limitation Act, art. 179, cl. (4). The application contemplated by that article is an application to obtain some order of the Court [829] in furtherance of the execution of the decree. See *Umesh Chunder Dutta* v. *Soonder Narain Deo* (2).

Dr. *Ashutosh Mookerjee*, for the respondents.—An application by the decree-holder to have the sale confirmed has been held to be a step-in-aid of execution in the case of *Gobind Persad* v. *Runglal* (3). An application by the decree-holder to take out the sale proceeds is a step-in-aid of execution: see *Paran Singh* v. *Jawahir Singh* (4). In this case the application made for the return of the decree is an application within the meaning of art. 179, cl. (4) of the Limitation Act. The case of *Krishnayyar* v. *Venkayyar* (1) supports my contention.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

The questions here are: (*a*) whether an application to the Court by a decree-holder, who has himself purchased some of his debtor's property at an auction sale, to receive the amount of poundage from him, is an

(1) 6 M. 81. (2) 16 C. 747. (3) 21 C. 23. (4) 6 A. 366.

application made in accordance with law to the proper Court to take some step-in-aid of execution of the decree; and (b) whether an application by him to a Court, to which his decree has been sent for execution and which has realized a portion of the debt to give him the decree as he requires it for taking out execution in the Court of another Munsif, is such an application.

The learned District Judge has answered the first question in the negative, and, as we agree with him, it is not necessary for us to say more on that point. He has, however, answered the second question in the affirmative, and in that answer we are unable to agree.

When a decree, which has been sent by the Court which passed it to another Court for execution, has been executed or partly executed by that Court, the proper procedure, as prescribed by s. 223 of the Civil Procedure Code, is for that Court to certify what has been done to the Court, which passed the decree, and if this is not done, the decree-holder may, no doubt, [830] apply to the executing Court to send the necessary certificate, and though this is not expressly provided, to return the decree itself if it has not been completely executed.

This is what was done in the case of *Krishnayyar* v. *Venkayyar* (1), and was held by that Court to be an application to take a step-in-aid of execution within the meaning of the law of limitation, inasmuch as, we understand, that it was an application to a Court to take a step which it was necessary should be taken before the execution could proceed. The present case is entirely different, as this was merely an application by the decree-holder to the Court to which the decree had been sent to give the partially executed decree to him. In giving the decree to him, the Court did not take any step-in-aid of execution, as it is not one of the things which that Court was empowered or required to do by law for the purpose of executing or assisting to execute the decree; and although it may be that the object of the decree-holder in getting possession of the decree was to get it further executed, we do not think his application to have it given into his possession can, by any forcing of the words, be held to have been an application to a Court, according to law, to take a step-in-aid of execution of the decree. As for these reasons we disagree with the judgment of the learned Judge, we set aside his decision and restore that of the Munsif with costs in both Courts.

S. C. G. *Appeal allowed.*

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22 C. 830.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

NASIR ALI FAKIR (*Decree-holder*) v. MEHER ALI *alias* CHUTTAI FAKIR (*Opposer*).* [22nd July, 1895.]

Appeal—Civil Procedure Code (*Act XIV of* 1882), s. 331—*Specific Relief Act* (*Act I of* 1877), *s.* 9.

A obtained a decree for possession of certain land against *B* and others under s. 9 of the Specific Relief Act. He was obstructed by the defendant, a third party, when he went to take possession. Thereupon he [831] applied to

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* Appeal from Appellate Decree No. 670 of 1894 against the decree of Babu Bulloram Mullick, Subordinate Judge of Khulna, dated the 14th December 1893, reversing the decree of Babu Sitikanta Mullick, Munsif of Bagirhat, dated the 28th June 1893.

(1) 6 M. 81.

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the Munsif's Court for the removal of the obstruction, and his application was registered as a regular suit under s. 331 of the Code of Civil Procedure. The Munsif gave the plaintiff a decree. On appeal the Subordinate Judge reversed it. Against the order of the Subordinate Judge, the plaintiff appealed to the High Court, on the ground that the preceedings under s. 331 were merely a continuation of the original suit under s. 9 of the Specific Relief Act, and as no appeal lay against a decision passed under that section, no appeal lay to the Subordinate Judge.

Held, that proceedings under s. 331 of the Code are in the nature of a fresh suit between the decree-holder and a third party, and therefore an appeal lay to the Subordinate Judge.

Ravloji Tamaji v. *Dholapa Raghu* (1) distinguished. *Muttammal* v. *Chinnana Goundan* (2) ; and *Kalima* v. *Nainan Kutti* (3) referred to.

[R., 11 C.L.J. 478 (480)=5 Ind. Cas. 573.]

ONE Nasir Ali Fakir obtained a decree for possession of certain land against Yar Ali Fakir and others under s. 9 of the Specific Relief Act. In execution of that decree he went to take possession of the land, but was obstructed by one Meher Ali Fakir, a third party. Thereupon, the decree-holder complained to the Munsif and his complaint was registered as a regular suit under s. 331 of the Code of Civil Procedure, he being the plaintiff and the objector the defendant. The Munsif gave the plaintiff a decree. On appeal to the Subordinate Judge, this decree was reversed. The plaintiff then appealed to the High Court mainly on the ground that, as the proceeding under s. 331 of the Code was a continuation of the original suit under s. 9 of the Specific Relief Act, and as there was no appeal against an order under that section, therefore no appeal also lay in the case to the Subordinate Judge.

Babu *Sarat Chunder Roy Chowdhry*, for the appellant.

Moulvie *Mohomed Tahir* (for Moulvie *Syed Shamsul Huda*), for the respondent.

The judgment of the Court (NORRIS and GORDON, JJ.) was as follows :—

JUDGMENT.

GORDON, J.—The plaintiff in this suit obtained a decree for possession of certain land under s. 9 of the Specific Relief **[832]** Act. When he went to take possession in execution, he was obstructed by the defendant. Thereupon the decree-holder complained to the Court, and his complaint was registered as a suit, he being the plaintiff and the person who obstructed him in execution the defendant. The Munsif gave the plaintiff a decree. On appeal the Subordinate Judge reversed it. One of the points taken before the Subordinate Judge was that no appeal lay from the Munsif's order under s. 331, on the ground that this was merely a proceeding in continuation of the original suit under s. 9 of the Specific Relief Act, and as no appeal lay against a decision passed under that section, no appeal lay in this case to the Subordinate Judge. This point has also been urged before us in second appeal.

We think that the view contended for cannot be accepted. The wording of s. 331 of the Code of Civil Procedure is distinctly opposed to it. That section lays down that if the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the claim shall be numbered and registered as a suit between the decree-holder

(1) 4 B. 123. (2) 4 M. 220. (3) 13 M. 520.

as plaintiff and the claimant as defendant," and the Court shall then "proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of chapter V." And the concluding paragraph is: "Every such order shall have the same force as a decree and shall be subject to the same conditions as to appeal or otherwise."

1895 JULY 22. — APPELLATE CIVIL. — 22 C. 830.

We are clearly of opinion that proceedings under this section are in the nature of a fresh suit between the decree-holder and a third party, and that, therefore, an appeal lay to the Subordinate Judge in the case. We have been referred to the case of *Ravloji Tamaji* v. *Dholapa Raghu* (1) as supporting the contention of the appellant; but we think that *that* case is not an authority for the proposition contended for in the present case. It appears to have reference rather to matters of jurisdiction for the purpose **[833]** of valuation, and for that purpose only proceedings under s. 331 of the Civil Procedure Code, may be considered to be proceedings in continuation of the original suit. Moreover this decision has been dissented from in the cases of *Muttammal* v. *Chinnana Gounden* (2) and *Kalima* v. *Nainan Kutti* (3).

We think, therefore, that this appeal fails and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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22 C. 833.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

HARAMONI DASSI AND OTHERS (*Plaintiffs*) v. HARI CHURN CHOWDHRY (*Defendant*).* [19th April, 1895.]

Misjoinder—Civil Procedure Code Act XIV of 1882, *ss.* 26, 27 *and* 31*—Joinder of plaintiffs—Persons jointly interested in a suit—Claims not antagonistic—Cause of action, Meaning of—Plaint, Amendment of—Parties.*

The plaintiffs 1 to 4 were the daughter and daughter's sons of one *G*. They alleged that *G* died, leaving an infant son *X*, an infant daughter *H*, and a widow *C*; that the son died leaving *C* as heir, and that upon *C*'s death, the sons of *H* became entitled to the property of *X*, but that should it appear that *G* did not leave X as his heir, *H* would succeed to the estate of *G* as next heir; and that the plaintiffs jointly granted a *putni* settlement of the property to one *B* (plaintiff No. 5), but he was kept out of possession by the defendant who claimed it by purchase from the representatives of *P*, brother of *G*. The plaintiffs 1 to 5 joined in bringing the suit which was one for possession of the property upon establishment of title either of plaintiff No. 1 or of plaintiffs Nos. 2, 3 and 4. On the objection of the defendant under s. 26 of the Code of Civil Procedure, that the suit was not maintainable for misjoinder of plaintiffs.

Held, that the expression "cause of action" occurring in s. 26 of the Code is used, not in its comprehensive, but in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself, so that the qualification implied in the words "in respect of the same cause of action" will be satisfied if the facts, which constitute the infringement of right of the several plaintiffs, are the same, though the facts constituting the rights upon which they base their claim to that relief in the alternative may not be the same; and that as the **[834]** plaintiffs in the case complained of the same wrongful act of the defendant constituting the infringement of their right, that was their cause of action, and

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* Appeal from Order No. 98 of 1894, against the order of Babu Krishna Nath Roy, Officiating Subordinate Judge of Khulna, dated the 18th of March 1894.

(1) 4 B. 123. (2) 4 M. 220. (3) 13 M. 520.

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22 C. 833.

as they all claimed the same relief, namely, possession, and further as they did not advance any antagonistic claim, such a case came within s. 26 of the Code and was not bad for misjoinder of plaintiffs.

Lingammal v. *Chinna Venkatammal* (1) *Nusserwanji Merwanji Panday* v. *Gordon* (2) dissented from. *Fakirapa* v. *Rudrapa* (3) followed.

[**F.**, 33 C. 367=10 C.W.N. 508; 3 O.C. 176 (178); 7 P.R. 1901; **Rel.**, 26 M. 647 (649) (F.B.); **R.**, 18 A. 131 (134); 25 A. 48 (52)=22 A.W.N. 179; 26 B. 259 (265)=3 Bom. L.R. 878 (880); 28 B. 94 (97); 34 C. 652=11 C W.N. 680; 6 C.L.J. 163 (166); 16 C.L.J. 1 (2)=16 Ind. Cas. 84; 13 C.P.L.R. 130 (135); 5 Ind. Cas. 325 (329); 16 Ind. Cas. 623 (624); 2 O.C. 17 (20); 28 P.R. 1907=93 P.L.R. 1908=140 P.W.R. 1907; 38 P.R. 1903=87 P.L.R. 1903.]

THE facts of the case, as stated in the plaint, are shortly as follows:—

One Gadhadhur Bhunja Chowdhry and his brother Protap Narayan Bhunja Chowdhry were members of a joint Hindu family. Protap Narain died in 1245 B. S., leaving him surviving two sons, Rajendra Narain and Sital Nath. Gadhadhur died in the year 1246 B. S., leaving behind him his widow Chundramoni, an infant son, and an infant daughter Haramoni. On the death of the infant son of the deceased Gadhadhur, his widow Chundramoni inherited the share of his property. Chundramoni died in the year 1295 B. S. The plaintiff No. 1, Haramoni, on the death of her mother, demanded the possession of the property left by her father from the heirs of Protap Narayan, deceased, but it was refused, and in the month of Jeyth 1296 B. S. the properties were sold to one Kalidas Adak, who again sold the property in dispute to defendant No. 1, Rai Hari Churn Chowdhry. The plaintiff No. 1 and her sons, plaintiffs Nos. 2, 3 and 4, granted a *putni* settlement of the property to plaintiff No. 5, who however failed to get possession.

The plaintiffs accordingly brought this suit for recovery of possession of the property by establishment of title thereto, on the allegations that at the time of the death of the father of plaintiff No. 1 she was a mere infant, and the other plaintiffs Nos. 2, 3 and 4 were not then born, so it would be difficult for them to prove whether the father of plaintiff No. 1 left a son at the time of his death, and that the said son died in his infancy; that in the event of such a son being left by Gadhadhur, the plaintiffs Nos. 2, 3 and 4 would, as sister's sons, be his heirs, but if it be not proved that he left a son, the plaintiff No. 1 **[835]** would inherit as the daughter of Gadhadhur; and that on the death of Chundramoni, widow of Gadhadhur, plaintiff No. 1 or her sons, plaintiffs Nos. 2, 3 and 4, would in any event be entitled to the property by right of inheritance either from Gadhadhur or his son.

The defendant No. 1, who alone contested the suit, objected to it on various grounds, but the only objection material to this report was that the plaintiffs were not entitled to join in bringing one suit. The Court below held that such a suit was not maintainable; and that the plaintiffs must elect whether plaintiff No. 1 or plaintiffs Nos. 2, 3 and 4 should bring the suit, and ordered the plaint to be returned for amendment.

Against this order the plaintiffs appealed to the High Court.

The Officiating Advocate-General (Sir *Griffith Evans*) and Babu *Bhobany Churn Dutt*, for the appellants.

Mr. *C. P. Hill* and Babu *Jogesh Chunder Roy*, for the respondent.

Mr. *W. C. Bonnerjee* for Sir *Griffth Evans.*—The Subordinate Judge has misunderstood the meaning of "cause of action" in s. 26 of the Code

(1) 6 M. 239. (2) 6 B. 266. (3) 16 B. 119.

of Civil Procedure. He has understood it to be a bundle of r ghts, and also the infringement of such rights. The cause of action in this case is what the defendant has done with respect to the property left by Gadhadhur. The case of *Lingammal* v. *Chinna Venkatammal* (1) is clearly distinguishable. In that case only one of the two widows of a deceased Hindu and her adopted son sued for the recovery of the whole of the family property if the adoption was valid, if not, for one-half of the estate. In this case the plaintiffs, either one or the other, would be entitled to the entirety of the estate and not a share, smaller in one case and larger in the other, *i.e.*, if plaintiff No. 1 be the next heir, or if the plaintiffs Nos. 2, 3 and 4 be the next heirs. The case of *Fakirapa* v. *Rudrapa* (2) is entirely in my favour. In this case both sets of plaintiffs are interested in disproving the case set up by the defendant. It is to be considered in a case like this whether the defendant has been embarrassed in his defence by the joinder of causes of action. If that is so, they may be separately tried. It is essential to see who are [836] the necessary parties in the case. The cause of action on the part of plaintiff No. 1 and on the part of plaintiffs Nos. 2, 3 and 4 cannot be said to be different. "Cause of action" means the infringement of right, and does not include the right. In the Judicature Act the expression "cause of action" does not appear. In the case of *Smurthwaite* v. *Hanny* (3), it has been held that the rule of joining several plaintiffs with distinct causes of action in one suit applies only to those cases where the several plaintiffs claim the "same relief," or where it is doubtful in which of the plaintiffs or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists. In this case the relief claimed is the same. If the words "same cause of action" mean right first and then invasion of it, then the word "severally" in s. 26 of the Code is very inconsistently used.

Mr. *Hill*, for the respondent.—It is to be seen in this case what is the meaning of the words "cause of action." In a suit for ejectment, it means (1) the right; (2) the infringement of such right. The expression, "cause of action," has been used consistently in the same sense throughout the Code. The law lays down that the plaint must state when and where it arose. The fact of the plaintiff No. 1 being dispossessed does not give any cause of action to the other plaintiffs. There is no allegation in the plaint when the other plaintiffs were dispossessed. There will be embarrassment to the defendant for that reason. In this case the *putni* has been created after dispossession. The cause of action is different for each of the sets of plaintiffs. There are distinct causes of action, although they may arise in the same transaction. It is not the relief that is to be looked to, but the cause of action. In the cases cited by the other side, there was no alternative statement of facts, and no distinct right was infringed; they are therefore distinguishable.

Sir *Griffith Evans* in reply.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order of the Subordinate Judge of Khulna returning a plaint for amendment on the ground that [837] it is bad by reason of misjoinder of different plaintiffs having different causes of action.

(1) 6 M. 239. (2) 16 B. 119. (3) L.R. App. Cas. (1894) 494.

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The plaint alleges in substance that the properties mentioned in the schedule to it were owned and possessed in equal shares by Gadhadhur Bhunja Chowdhry, father of plaintiff No. 1, Haramoni, and his brother Protap Narayan Bhunja Chowdhry; that Protap died in 1245, leaving two sons, and Gadhadhur died in 1246, leaving an infant son, an infant daughter, the plaintiff Haramoni, and a widow Chundramoni; that Gadhadhur's son died in his infancy, leaving his mother Chundramoni as his heir; that Chundramoni and Haramoni, plaintiff No. 1, lived in commensality with the sons and grandsons of Protap; that on the death of Chundramoni in Falgun 1295, the plaintiffs Nos. 2,3 and 4, sons of Haramoni, plaintiff No. 1, became entitled to the eight annas share of Gadhadhur, which had devolved on his infant son, as that son's sister's sons and next heirs; that if for want of evidence the plaintiffs fail to prove that Gadhadhur died leaving a son, plaintiff No. 1, Haramoni, would be entitled to Gadhadhur's eight-annas share as his daughter and next heir; that plaintiffs Nos. 1, 2, 3 and 4 have jointly granted a *putni* settlement of the said share to plaintiff No. 5; and that as the defendants have wrongfully kept possession of the said share, the plaintiffs Nos. 1 to 5 have jointly brought this suit for possession and mesne profits, upon establishment of the title of either plaintiffs No. 1 and No. 5, or of plaintiffs Nos. 2, 3 and 4 and No. 5.

The suit is brought against two persons, one of whom, defendant No. 1, is said to claim the properties in dispute by purchase from the representatives of Protap, and the other defendant No. 2 is said to hold the same in *putni* under defendant No. 1.

The defendant No. 1, who alone appears to have filed any written statement, denies that Gadhadhur ever had any interest in the properties in dispute; and he alleges that Gadhadhur died before his father, without leaving any son; that he does not know whether Chandramoni was the widow of Gadhadhur and plaintiff No. 1, Haramoni, was his legitimate daughter, nor whether plaintiffs Nos. 2, 3 and 4 are the legitimate sons of plaintiff No. 1; that by an ancient custom prevailing in the family to which Gadhadhur belonged, females and persons of a **[838]** different *gotra* have always been excluded from inheritance; and that neitheir plaintiff No. 1, nor her sons the plaintiffs Nos, 2, 3, and 4, can have any right by inheritance to any property which was originally owned by Gadhadhur; that he is a *bona fide* purchaser of the properties in dispute for value without notice of plaintiffs' claim; that the plaintiffs' claim is barred by limitation; and that the plaintiffs are not entitled to join in bringing one suit.

The Court below, upon the last-mentioned objection of the defendant No. 1, held that the plaintiffs Nos. 1 to 4 cannot join together in bringing this one suit, but that they must elect whether plaintiff No. 1 or plaintiffs Nos. 2 to 4 should carry it on; and on the 8th of March 1894 it ordered that the plaint be returned for amendment accordingly.

Against that order the plaintiffs have preferred this appeal, and it is contended on their behalf that the Court below is wrong in holding that there has been any misjoinder of plaintiffs in this case, such as would necessitate an amendment of the plaint, when s. 26 of the Code of Civil Procedure provides that persons may join as plaintiffs in whom the right to any relief claimed is alleged to exist "in the alternative in respect of the same cause of action." On the other hand, it is argued by the learned Counsel for the respondent, that though persons setting up a right to any relief claimed in the alternative may join as plaintiffs, it must, as s. 26 of

the Code requires, be in respect of the same cause of action, and as the phrase "cause of action" includes not merely the facts constituting the infringement of the plaintiffs' right, but also those constituting their title, and these last, in the present case, are different and conflicting, the plaintiffs cannot be said to be claiming relief in the alternative in respect of the same cause of action.

The point raised in this case is not free from doubt and difficulty. Its determination must depend upon the construction of s. 26 of the Civil Procedure Code read with s. 31.

Section 26 of the Code of Civil Procedure is taken word for word from Order XVI, Rule 1 of the Supreme Court of Judicature, with the addition of the words "in respect of the same cause of action" at the end of the first sentence. This qualification seems to have been added to avoid any difficulty that might arise from [839] a literal construction of the English rule, namely, the joining of plaintiffs with distinct causes of action in one suit, as was held to be allowable in the case of *Booth* v. *Briscoe* (1). The doubts attending the construction of the English rule have been set at rest only recently by the decision of the House of Lords—*Smurthwaite* v. *Hannay* (2)—in which it has been held that the rule applies only to those cases where the several plaintiffs claim the same relief, or where it is doubtful "in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists." But though the addition of the words "in respect of the same cause of action" may have been intended to remove a difficulty of one sort, it has produced a difficulty of another sort, namely, that of construing the section so as to make the qualification implied by those words compatible with the case in which different plaintiffs claim the same relief in the alternative. For if the phrase "cause of action" be taken in its comprehensive sense as including the entire set of facts that gives rise to an enforceable claim, that is, the right and its infringement—see *Read* v. *Brown* (3)—it is difficult to imagine a case in which two plaintiffs can claim the same relief in the alternative in respect of the same cause of action, that is in respect of the same right and the same infringement thereof. From the very fact of their claiming the same relief in the alternative, the facts which constitute their right to it, as alleged by them, must be not only different, but also conflicting and mutually exclusive. The learned Counsel for the respondent sought to obviate this difficulty by putting forward the same view that was taken in the cases of *Lingammal* v. *Venkatammal* (4), namely, that the words "in the alternative" apply to cases in which there is a doubt as to who is the person entitled to sue upon the cause of action, as in the case of a sale to an agent, in which there may arise a difficulty as to whether the principal or the agent should sue, or in cases where parties have different and conflicting interest in the same subject matter, and an act is committed which gives the same cause [840] of action to either party according to the eventual determination of the Court as to which of the two is entitled to recover.

We feel, no doubt, that the cases here suggested are among those to which the words in the alternative are intended to apply; but what we feel some difficulty in understanding is as to how the principal and the agent in the one case, and the parties having different and conflicting interests in the other, can be said to have the same cause of action, if

(1) L.R. 2 Q.B.D. 496.
(2) L.R. App. Cas. (1894). 494.
(3) L.R. 22 Q.B.D. 131.
(4) 6 M. 239.

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that expression be taken to include the facts which constitute the right and its infringement, when the facts which constitute their rights must be different.

Following the ordinary canon of construction that a clause in a statute should be construed, so as to give some meaning to every part of it, and bearing in mind that the expression "cause of action" has not been defined anywhere in the Civil Procedure Code, except indirectly for the purposes of s. 17, and that so far as that section goes it is used in a restricted as well as in some respects in an elastic sense, we think the proper way to construe s. 26, so as to give the words in the alternative some meaning, is to hold that the expression "cause of action" occurring in it is used, not in its comprehensive, but in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself, so that the qualification implied in the words "in respect of the same cause of action" will be satisfied if the facts which constitute the infringement of right of the several plaintiffs are the same, though the facts constituting the right upon which they base their claim to that relief in the alternative may not be the same. We are aware that this view is opposed, not only to the Madras case already cited, but also to that of *Nusservanji Merwanji Panday* v. *Gordon* (1), but we feel constrained to dissent from these decisions so far as the point now under consideration is concerned, as otherwise we find it impossible to make s. 26 consistent with itself. Nor do we think that this view is opposed to the prohibition implied in s. 31 of the Code against the joining of plaintiffs in respect of distinct causes of action.

But besides the restriction imposed upon the joinder of **[841]** plaintiffs under s. 26 of the Code by the words "in respect of the same cause of action," there is a further restriction implied in the rule enunciated in the first sentence of the section, wholly irrespective of those words, as pointed out in the case of *Smurthwaite* v. *Hannay* (2) cited above, which limits the application of the rule to cases in which the relief claimed by the plaintiffs who are joined is "the same relief," or where "it is doubtful in which of the plaintiffs, or in what number of the plaintiffs. and whether jointly or severally, the legal right to relief exists."

Now let us see how the combined operation of these two restrictions to the joinder of plaintiffs affects the joinder of the plaintiffs in the present case. The plaintiffs here all complain of the same wrongful act of the defendants as constituting the infringement of their right, that is, their cause of action (in the restricted sense explained above), namely, the retaining of wrongful possession of the property in dispute to which the plaintiffs are entitled ; they all claim the same relief, namely, possession and mesne profits ; and they have joined in bringing their suit, because the fifth plaintiff has a derivative interest, namely, a *putni* interest in the property in dispute, and the other four plaintiffs, though they advance no antagonistic claims, and all admit that the right to the proprietary interest is in plaintiffs Nos. 2, 3 and 4 as the heirs of the son of Gadhadhur, are in doubt as to whether they will be able to prove that Gadhadhur died, leaving a son, or whether the Court will eventually hold that Gadhadhur was the last full owner ; and that the right to the disputed property by inheritance was in his daughter, the plaintiff No. 1, and not in her sons, the plaintiffs Nos. 2, 3 and 4. The immediate legal right to the relief claimed is the right by inheritance, to take upon the death of Chundramoni,

(1) 6 B. 266. (2) L. R. App. Ca. (1894), 494.

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the property which originally belonged to Gadhadhur, though it is doubtful whether that right is in plaintiff No. 1 or in plaintiffs Nos. 2, 3 and 4, by reason of there being doubt as to how certain facts antecedent to the succession of Chundramoni, and subsequent to the demise of Gadhadhur, happened. Such a case, in our opinion, comes clearly within s. 26 of the Code of Civil Procedure, [842] as explained above, as being a case in which the right to the relief claimed is alleged to exist jointly as between those claiming the proprietary and *putni* interests, and in the alternative as between those claiming the proprietary interest in respect of the same cause of action.

Again, another fair test to apply in order to ascertain the meaning and intention of the Legislature in cases like this is to compare the result of the two sets of plaintiffs suing jointly, as they have done, with that of their suing separately, each set putting forward that branch of the alternative which would vest the right to relief in them. In the former case, accepting, as we must do at this stage, their other allegations to be well founded, one of the two sets of plaintiffs must have the right to the relief asked for, but one *only can have it* and as the two sets do not quarrel between themselves, the case may be disposed of without any determination (unless the defendants want it) of the doubtful issue of fact as to whether Gadhadhur did or did not die leaving a son. In the latter case, that is, where separate suits are brought, there, too accepting the other allegations as true, one of them must be decreed, but *only one can be decreed*, and the doubtful issue of fact mentioned above must be determined to ascertain which of the two suits should be decreed, though if the plaintiffs had not been compelled to sue separately, there being no conflict between them, its determination would have been unnecessary. Thus, by the one course are avoided a multiplicity of suits, and the determination of an unnecessary issue which would be unavoidable in the other course, and the Legislature could never have intended the latter course in preference to the former. The object of the defendant in resisting the joinder of plaintiffs in this case is evident. He wants that they should be made to fight against each other, though they do not wish to do so, and thus each destroy the case of the other upon the point as to whether Gadhadhur did or did not leave a son; but he forgets that both the two alternatives cannot be false, and that one of them must be true. One fails to discover any reason based upon grounds of fairness and justice, or grounds of convenience to litigants, or to Courts for which the Legislature [843] could have prohibited the joining of plaintiffs in a case like this. We must, therefore, hold that they have been rightly joined, and that the frame of the suit is not bad on account of the misjoinder of plaintiffs. We may add that the case of *Fakirapa* v. *Rudrapa* (1) is very much in point, and fully supports the view we take.

The result, then, is that this appeal must be allowed, the order appealed against set aside, and the case sent back to the Court below with direction to allow the plaintiffs to proceed with the suit upon the plaint as framed.

Appeal allowed.

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(1) 16 B. 119.

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PRESENT:

Lords Watson, Hobhouse, Macnaghten and Shand and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

BHAGABAN RAMANUJ DAS (*Plaintiff*) *v.* RAM PRAPARNA RAMANUJ DAS (*Defendant by Revivor*). [9th, 15th, 21st and 28th November, 1894 and 2nd February, 1895.]

Hindu Law—Endowment—Succession as mohant of a Muth *at Puri—Customary rule—Right of a* chela—*Alleged disqualification of* mohant *to take a* chela *by reason of being a leper.*

Two rival claimants contested the right to succeed to the office of *mohant* of a *mourasi muth* under a customary rule of succession. Both the Courts below found that the *mohant* for the time being had power to appoint his successor from among his *chelas*; that in the absence of appointment, a *chela*, or, if there should be more than one, the eldest *chela*, would succeed; and that should there be no *chela* then a *gurubhai* or *chela* of the same *guru* with the deceased *mohant* would succeed.

The plaintiff's case was that he had been duly taken as a *chela* and appointed by the last *mohant* whose title was not disputed. The defendant, who was in possession, denied that the plaintiff had ever been such a *chela*, alleging that, even if the last *mohant* had attempted to take him as a *chela*, this act would have been invalid by reason of that *mohant* having been a leper. The defendant's title was that he had been taken as a *chela* by the *mohant* who had preceded the last, and had been in a position to dispute the right of succession, but had yielded it when the last *mohant* had taken office **[844]** He put forward an alleged will of the latter, which stated that he was to succeed, and relied on his possession approved by other *mohants*.

Held, that only a leprosy of virulent form could have disqualified the last *mohant*. As to it there was no medical evidence; but on the facts the conclusion was that there had been no such disqualification. The statements in the alleged will were not true, and it was ineffectual to alter the title, whether the last *mohant* had executed it or not, having no testamentary effect. Also, what had been done after the death of the last *mohant* could not deprive the plaintiff, or entitle the defendant, there being no custom to authorize the choice of a *mohant* in that way.

[**F.**, 19 M. 74 (75); 18 Ind. Cas. 490; **Rel.**, 4 C.L.J. 323 (328); **R.**, 9 Bom. L R 1149 (1151).]

APPEAL from a decree (27th April 1891) of the High Court, reversing a decree (29th April 1880) of the Subordinate Judge of Cuttack.

The suit, instituted on the 25th November 1887, was to obtain a declaration that the plaintiff had the right to succeed as *mohant*, on the death of the last, and for possession of the Dakhinparsa *muth* at Puri, and its endowments, valued at from one and a half to nearly two lakhs. The title alleged by the plaintiff, now appellant, was that he had been taken as *chela*, and appointed to succeed by the last *mohant*, Hoigrib Ramanuj Das, who had held office, without dispute, from 1868 to 1880; and the plaint alleged that the latter, being a full brother of the father of the plaintiff, had brought him, when about ten years old, from Ghazipur on the Ganges, his native place, to Dakhinparsa and made him his *chela* on the 20th Magh 1282 (February 1876), giving to him the name Bhagaban Ramanuj Das; that Hoigrib kept him there for about four years, and then sent him to Benares, where he was instructed by a *pundit*; thence he went on a pilgrimage; and, on his return to Daghinparsa, he found that Hoigrib had died on the 10th May 1880; that the defendant Roghunundun had obtained possession of the *mohantai gaddi*, setting up a will said to

have been executed by Hoigrib about forty-eight hours before he died; this, however, was not genuine; and that while he, the *chela* of the last *mohant*, was chosen also by him for his successor, no one else could succeed.

The defence was that the plaintiff had not become the *chela* of Hoigrib Das, who, even if he had gone through the form of taking him, could not have done so effectively, as he was disqualified to **[845]** perform the necessary ceremonies by being a leper; that, on the other hand, *mohant* Chaturbhuj Das, the predecessor of Hoigrib, had taken the defendant as his *chela* in Kartick 1257 (November 1850), and that it was owing to some differences that had arisen between the defendant and that *mohant*, as well as owing to the defendant's absence on a pilgrimage, that the younger *chela*, Hoigrib, obtained the succession. Returning to Dakhinparsa the defendant became reconciled to Hoigrib, and was in the end appointed his successor, being his *gurubhai*; lastly, that he had, on the 13th day after his death, been installed *mohant* in the presence of *mohants* of other *muths*, with all due ceremony.

The questions on which this appeal mainly turned were the following: What was the rule of succession on this *mourusi muth* according to the evidence, and was it the case, as the plaintiff alleged it to be, that, if there was a *chela* of the deceased, his right must be preferred; or, could the *mohant* in his lifetime choose between his *chela* and *gurubhai*, appointing which he chose? *Secondly*, did Hoigrib, the last *mohant*, take the plaintiff as his *chela* in 1876, and, if he did so, was that ceremony void and ineffective by reason of his being at that time in such a state of leprosy that it disqualified him from taking a *chela*? *Thirdly*, had the defendant been, as he alleged, taken as a *chela* by the *mohant* Chaturbhuj in 1850, so as to be *gurubhai*, with Hoigrib, and had he been appointed by the latter, as the will produced by the defendant asserted, and were the facts truly stated in that document?

The Courts received in evidence a report of the 18th April 1850, corresponding to the 8th Baisakh 1257 B.S., made by a number of *mohants* and other Brahmins connected with the religious institutions in Puri to the Collector of the Southern Division of Cuttack in answer to a *perwana* on the subject of succession among the *mohants* and *adhikaris* of the *muths* of Puri. The *perwana* suggested that it would be desirable that those *mohants* who had the power of nominating their successors, should inform the Collector of the appointments made by them, and asked whether there was any objection to such a course being followed. In this report the rule of succession in *mourusi muths* in Puri was stated to be as follows:—

[846] "In your honour's *perwana* it is stated that only this subject is to be considered, *viz.*, of the *mohants* and *adhikaris* who occupy the *guddis* of the *muths* of Puri those who have the power to nominate their successors after their death will, during their lifetime, select those whom they think fit to be their respective successors, and give information to your honour mentioning their names, so that their nominees may be confirmed soon after the death of the said *mohants* or *adhikaris*. Now if any *mohant* or *adhikari* who holds the *guddi* of any one of the *mourusi muths* of Puri dies suddenly while away from Puri either on pilgrimage or on other business, and if at that time he has taken no *chela*, owing to his being young in age, in such a case this procedure will not be applicable.

"In the case of such a deceased person, either his *gurubhai* or, if he has left no *gurubhai*, then the *bhatija-chela* or *nati-chela* (whichever

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amongst them may be fit to occupy the *gaddi*) becomes the *malik* and *gaddi-nashin* according to rule. Moreover, if any *mohant* or *adhikari* who occupies the *gaddi* of any of the said *muths*, despairing of his own life, wishes to make either his senior *chela* or his junior *chela* or an *adhikari* or his *gurubai* the *malik* of the *muth* during his lifetime, then he has the power to make him the *malik* and *gaddi-nashin*, provided that he (the man chosen) is a Brahmin of high caste and is fit to be the *gaddi-nashin*. In such circumstances nobody else has the power. In case he has no *chela*, he can give the *kanthi* either to his own *gurubhai*, or, if there be no *gurubhai*, then to his *bhatija-chela* or *nati-chela* whichever amongst them is in his opinion capable and fit to be *gaddi-nashin*, and will inform your honour of his decision that such a person is to be the *malik* after his death ; so that such a person will be the occupant of the *gaddi* and the *malik* of the *muth*. Under such circumstances, nobody else can be the *malik* or entitled to any right by virtue of any document or as a rival. After the death of any *mohant* or *adhikari* of a *muth*, whose *malik* has not come to any such decision as above, a junior *chela* cannot be the *malik* or *gaddi-nashin* if the *mohant* has left a senior *chela* as heir. If the senior *chela* is not competent, or is a leper or blind, then amongst the junior *chelas* he who is competent and fit to be the *gaddi-nashin* will be the *malik* and *gaddi-nashin*. But he who is not a Brahmin by caste, and who is either a Sudra or a Sanjogi (man of unknown parentage, &c.) cannot become *gaddi-nashin*. These rules have been prevalent from past times, and if such rules remain in force in future there will be nothing contrary to the *Shastra*."

The rest of the report related to the *muths* other than the *mourusi muths*. The *mohant* Chaturbhuj Das, and forty-eight other heads of *muths*, signed the report, which was admitted in evidence under s. 32, cl. 4, of the Evidence Act of 1872 as an opinion of certain persons deceased.

Upon the above, and upon the oral statements of several [847] *mohants* of *muths* at Puri at the hearing before the Subordinate Judge, Babu Jogesh Chunder Mitter, the customary right of succession was found to be in the *chela* of the last preceding *mohant*, or in one of his *chelas* whom he appointed.

Both the Courts below found that the *mohant* of a *mourusi muth* (that being a *muth* wherein the deceased *mohant* is succeeded by his *chela*) has a power of appointment from among his *chelas* if more than one ; that in the absence of appointment a *chela* succeeds ; that if there are more, the eldest ; and in the absence of a *chela* a *gurubhai* succeeds. The first Court found that, even if it were true that the defendant was the *gurubhai* of Hoigrib, he would not be entitled to succeed in preference to the plaintiff, who was *chela* of the deceased, for a *gurubhai* could not succeed in preference to a *chela*. That the plaintiff had been taken as Hoigrib's *chela* in February 1875 the first Court found to have been proved : and found that it was not proved that at that time Hoigrib was suffering from incurable leprosy. Hoigrib was not disqualified from doing religious acts as *mohant*. Thus the first Court found that the plaintiff's title had been established. On the other hand, that Court was of opinion that "the evidence as to the defendant's title is not only unsatisfactory but the probabilities are wholly against his having any title." The Subordinate Judge treated the will as merely documentary evidence given by the defendant to rebut the evidence of the plaintiff's being a *chela*, and to prove that the defendant was Hoigrib's *gurubhai*,

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and he found that the will was not the will of Hoigrib, besides disbelieving the statements in it. The first Court accordingly decreed the plaintiff's claim.

This decision was reversed by the High Court (TOTTENHAM and TREVELYAN, JJ.). Upon the question of the rule of succession there was no substantial difference between the two Courts, but the High Court said: "We think that a *mohant* can choose between his *chelas*, his *adhikari*, and his *gurubhai*; but only in the event of there being no *chela* or *gurubhai* can he choose a *bhatija-chela* or *nati-chela*." The explanation of these words being that *gurubhai* is *co-chela* with the *mohant*, *adhikari* [848] a superintendent, *bhatija*, a nephew, that is the son of a *gurubhai* and *nati* born of the same spiritual progenitor; the two latter terms being taken from the analogy of secular successions. The High Court, however, agreed no further with the first Court. They first dealt with the will which they found to have been duly executed by Hoigrib, and considered to be necessarily subversive of the plaintiff's case. After an examination of the evidence as to the preparation and execution of the will, as to the manner in which it was produced and acted upon, also in regard to the previous position of the defendant respondent in the *muth*, they arrived at the conclusion that the will was the will of Hoigrib, having been written in accordance with his instructions. They referred to the inference from the instant recognition of the defendant as *mohant* by the other *mohants* and the plaintiff's long delay in putting forward his claim; while they treated as very doubtful the story of his absence on pilgrimage. On the whole they said: "We must find that the plaintiff has not proved to our satisfaction that he was *chela* of Hoigrib. In fact we think it pretty clear that he was not such *chela*." Upon another point they equally disagreed with the Subordinate Judge. They said: "We think it also clear upon the evidence that Hoigrib was a leper at the time of the alleged appointment of the plaintiff as *chela*; that he died of leprosy there can be no question."

The plaintiff, thereupon, appealed.

The defendant Raghunundun having died pending the appeal was now represented by *mohant* Ram Praparna Ramanuj Das, respondent, by revivor.

Mr. *R. B. Finlay*. *Q.C.*, and Mr. *R. V. Doyne*, for the appellant.—By the custom regulating the succession to the office now in question the plaintiff, being the validly appointed *chela* of the last *mohant*, was entitled to succeed. There was good evidence that the plaintiff had been taken as *chela* by the *mohant* Hoigrib Das in 1875, and the attempt had failed to impugn the validity of the *mohant's* act in so taking him. No sufficient evidence had been given to show that the *mohant* was a leper, and there was no evidence to show that he suffered from leprosy [849] of a virulent type, which alone, according to Hindu law, could disqualify; the milder form of the disease not having that effect. Reference was made to *Ananta* v. *Rama Bai* (1); *Lakshmi Narayan Singh* v. *Tulsi Narayan* (2), and to a note upon the last case in which the opinion of the Benares *pundits* was given (see p. 286 of the report), *Issur Chunder Sein* v. *Ranee Dossee* (3). No real support was given to the defendant's case by the production of the will, which purported to have been executed by Hoigrib. The Subordinate Judge has rightly, upon the facts, found that

(1) 1B.H.C. 554.
(2) 5 Sel. Rep. 285=7 I. D.(O.S.) 583.
(3) 2 W.R. 125.

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it was not the will of Hoigrib; but even if it was his duly executed will, the testator could not legally have displayed the title of the plaintiff as his appointed *chela*. That title was founded on the custom of the *muth*, and for Hoigrib to have appointed a *gurubhai* in his place would have been, under the circumstances, beyond his authority. The evidence that the defendant had been made a *chela* by the preceding *mohant*, Chaturbhuj, was mainly what was stated in the will, and this afforded no proof of the fact. Some of the statements in the will were in direct contradiction to the petition filed in 1867 by Chaturbhuj himself. The recognition of the defendant as successor by the *mohants* of the neighbourhood could not alter or affect the rule of succession.

Mr. *J. D. Mayne* and Mr. *J. H. A. Branson*, for the respondent.—The evidence for the plaintiff had not established that he had been taken as a *chela* by Hoigrib. But the determining consideration was that the evidence had made it apparent that Hoigrib for nine years before his death had suffered from virulent leprosy, which resulted in his dying of that disease. This necessarily disqualified him for taking a *chela*, nominating a successor, and for performing ceremonies connected with such acts. The witnesses for the plaintiff had attempted to prove too much in denying the leprosy of Hoigrib, and the Subordinate Judge had gone no further than to find it not proved that he was in a state of incurable leprosy. They referred to *Ananta* v. *Ramabai* (1), *Janardhan Pandurang* v. *Gopal* (2), showing that [850] leprosy of a virulent type disqualified a *mohant*, and to *Muthuvelayada Pillai* v. *Paraskti* (3). It was proved, although there was no medical testimony, of which there was none on either side, that the leprosy of Hoigrib was of a disqualifying character within the cases cited. As to the distinctions in leprosy, the Encyc. Britan., Tit. "Leprosy," p. 469, was referred to. On the general law as to the position of *mohants* of *muths*, the judgment in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambhiran* (4) was cited. The will of Hoigrib had, moreover, been shown to be genuine, and it was evidence that the defendant had a good title as *gurubhai* appointed in the absence of any *chela* having been taken. Defendant had the better title under the will. His recognition by the *mohants* of the neighbourhood went far to support the title which he had from the first put forward; and if they had adopted a correct opinion that the claimant's allegation of his being *chela* was unfounded, the case had arisen in which the appointment of the *gurubhai* was authorized by the rule of succession.

Mr. *R. B. Finlay*, Q.C., replied.

JUDGMENT.

Afterwards, on the 2nd February 1895, their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal relates to the right to succeed as *mohant* of a *muth*, or Hindu religious institution, called Dakhinparsa situated in Puri near the Temple of Juggernath, of which in 1850 and for some years before Chaturbhuj Das Gossain was the *mohant*. On the 15th February 1850 the Collector of the southern division of zillah Cuttack, with a view to putting an end to the frequent disputes which arose as to the right of succession to the *muths* at Puri, of which there was a very great number, called on the *mohants*, who claimed the right of nominating their successors, to make their selections and

(1) 1 B.H.C. 554. (2) 5 B.H.C. A.C. 145.
(3) Mad. S.D.A. (1859, 1862) 238. (4) 10 M. 386.

report them to him, and to inform him also whether they were of opinion that so doing was contrary to the *Shastras*, and he invited a detailed representation on the matter and their opinion thereon. On the 18th April 1850 a report was submitted to the Collector by a great number of the *mohants*, Chaturbhuj being one of them, and from this and the oral evidence [851] in the case it has been found by the Subordinate Judge and the High Court that the *mohant* has a power of appointment from among his *chelas* or disciples if more than one; that in the absence of appointment a *chela* succeeds; if there are more than one, the eldest succeeds; and in the absence of a *chela* a *gurubhai* (a *co-chela* of the *mohant*) succeeds.

On the 6th May 1861 Chaturbhuj presented a petition to the Civil Court of Cuttack within whose jurisdiction the Dakhinparsa *muth* was, in which he said: "I have kept in my *muth* a Brahmin lad whose name is Hanuman Das and who belongs to the North-West, the place of my birth, and whom I brought here when he was only five years old. I have invested him with the sacred thread in accordance with the *Shastras*, and having duly made him my *chela* and having caused him to read the *Shastras* in Sanskrit, &c., I have instructed and brought him up in a variety of accomplishments. I have given him the custody of the key and lock of the building of the *muth*, and have through him been managing all sorts of business. Besides him I have nobody else. . . The said Hanuman Das, better known as Hoigrib Ramanuj Das, will after my death become the *mohant* and occupier of the *guddi* of the *muth* and manage all affairs and expenses of the *amrita-manohi* of Jagannath Mahaprobhu. If anybody object to this on the allegation that he is my *chela* then his objection will not be fit to be accepted, nor will it be accepted. So with the object of avoiding any dispute regarding my *muth* I file this petition and pray that it be ordered that this petition may be kept in the public office." The petition appears from an official entry to have been presented by Chaturbhuj in person, and it was ordered to be filed in the office.

On the 21st August 1862 Chaturbhuj executed a deed in which he declared as follows :—

I am the *mohant* and occupier of the *guddi muth.* I have a *chela* Hoigrib Ramanuj Das who is very expert in serving me. His conduct is also good and worthy of an occupier of a *mohant's guddi.* I have no other *chela* or heir besides him. With this view I have already filed in the Civil Courts and in the Collectorate petitions making known that the said Hoigrib Ramanuj Das will be the successor to my office after my death and will be the occupier of the *mohantai guddi* and owner and possessor of the *muth* and all moveable and immoveable properties belonging to it. Therefore, inasumch as at [852] present I have become old and intend to prevent all future obstruction to the succession to my *mohantai guddi*, I transfer, with the exception of the right of occupying the *mohantai guddi*, all the aforesaid moveable and immoveable properties to the said Hoigrib Ramanuj Das of my own will and make him the owner as of right and in possession of the same. He will get his name registered in accordance with law. . . . After my death he will get the *mohantai guddi*."

On the 27th March 1867 Chaturbhuj presented another petition, referring to the former one, and stating that he had put Hoigrib in possession of the *muth* with all its properties, and praying that, in accordance with the prayer of his *chela* Hoigrib Ramanuj Das, it might be ordered that his name might be recorded. In this petition Chaturbhuj

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says: "I have no other *chela* or heir besides the said Hoigrib Das." Chaturbhuj died on the 20th March 1868. On the 12th June 1873 Roghunundun, the original respondent, who has died during the appeal, presented a petition in opposition to a petition of Hoigrib for a certificate of heirship to Chaturbhuj in which he is described as "Mohant Roghunundun Ramanuj Das, eldest *chela* and heir of Mohant Chaturbhuj Ramanuj Das deceased." That petition contains the following statements:—

"Hoigrib Ramanuj Das, alleging himself to be the *chela* and heir of Mohant Chaturbhuj Das, deceased, has applied for a certificate of heirship and notification to that effect has been issued. The petitioner is by no means the *chela* and heir of my deceased *guru*, and cannot obtain a certificate on that basis. The deceased Mohant Chaturbhuj Das, knowing that I am the son of a good Brahmin and fit to be the *mohant* of the *muth* in accordance with the custom of *muth-holders*, took me as *chela* in proper form and brought me up by educating me in several branches of learning and the Baishnab religion. The petitioner is by birth the son of the uterine brother of my deceased *guru*. The petitioner being afflicted with leprosy from childhood, and not being fit in after-life to perform the duties of a householder, was left by his father to pass his days in the *muth*. My *guru*, the deceased *mohunt*, being led by affection used to show favour to the petitioner as his nephew and as one who had fallen into bad circumstances. For this reason the petitioner was called by people generally the younger *chela* of my *guru*. Under these circumstances, even if the petitioner is the younger *chela*, I being the elder am the proper person to be the heir. . . . . For a *mohant* has frequently to perform the *sheba* of Jagannathji and has to manage the *amritamanohi* duties of the deity. A man afflicted with leprosy is unfit to perform such duties as *deb sheba*, &c., and people cannot come in contact with (touch) him. Therefore the petitioner being afflicted with leprosy is not fit to be **[853]** *mohant* in accordance with the *Shastras* and custom and cannot obtain the certificate of heirship."

In a deposition made on the 28th July 1873 in support of his petition Roghunundun said: "After the death of Chaturbhuj Hoigrib became the *mohant* with my permission. Before the death of Chaturbhuj I used to do the duties of *pujari* in the *muth*. I lived in the *muth* up to the death of Chaturbhuj." In a petition in answer to this presented by Hoigrib on the 28th July 1873 Hoigrib said: "The objector is by no means the *chela* of my deceased *guru*. . . . My *guru* had no other *chela* besides myself." No order for a certificate of heirship was made. Hoigrib continued in possession of the *muth* and to be the *mohant* until his death on the 10th May. After July 1873 Roghunundun took no steps during Hoigrib's lifetime to assert his right to be *mohant* or to have it declared that he was a *chela* of Chaturbhuj. He continued to perform the duties of *pujari*. On the 25th November 1887 the appellant brought a suit against Roghunundun, alleging that on the 20th February 1875 Hoigrib duly made the appellant his *chela*, and that being the *chela* and heir of Hoigrib he was entitled to possession of the *muth* and the properties appertaining thereto, and praying that on its being established that he was the *chela* and heir a decree might be passed giving him possession. His case is that being Hoigrib's uterine brother's son Hoigrib caused him to be brought to Puri from his birthplace and changed his former name Bhagabat Dobey according to the custom observed by previous *mohants*, and gave him the name of Bhagaban Ramanuj Das and duly made him

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his *chela*; that he remained in the Dakhinparsa *muth* for about four years after he became *chela* and then went to Benares; that he studied for eight or nine months and then went on pilgrimage; he then travelled as a pilgrim for two years and some months and then returned to Benares where he remained for about two or three months; after that he came to Puri where he learned that his *guru* died; that he wanted to enter the *muth* and was not allowed to enter it.

The case of Roghunundun in his written statement is that the appellant never became the *chela* of Hoigrib; that Hoigrib long before his death had been suffering from leprosy and was [854] therefore, according to the *Shastras* and custom, incompetent to adopt anybody as his *chela*, and if he adopted a *chela* the adoption was invalid; that when Roghunundun was twelve years old Chaturbhuj adopted him as his *chela* and Hoigrib was the younger *chela*; that Hoigrib, knowing Roghunundun was his *gurubhai*, and that he was in every respect competent to be *mohant*, consulted the principal *mohants* and *adhikaris* (superintendents) of the *muths* of his sect and the gentlemen of the town of Puri and the old servants of the *muth*, and before his death a will was duly executed in Roghunundun's favour stating therein the above facts, and after Hoigrib's death the *santhas* and *mohants* and gentlemen of the town of Puri assembled, gave him the *mohantai kanthi* and made him *guddi-nashin*.

The first and main question in the case is, was the appellant validly adopted by Hoigrib? In addition to the appellant's own evidence seven witnesses were called who said they were present when the adoption took place and spoke of the ceremonies then performed. Of these, three were *mohants* and two were *adhikaris* of neighbouring *muths*, and it did not appear that they had any connection with the appellant. On the part of Roghunundun there was the evidence on this question of five witnesses. The first was a mohurrir of the Puri Collectorate who spoke to a conversation with Hoigrib ten or twelve years before his death, in which he told him he had taken no *chela*. No other person appears to have been present. Such evidence is of no value. The next witness was one of Roghunundun's pleaders. His evidence was that Hoigrib about five or seven months before his death brought him a draft of a will, and having read it and afterwards conversed with Hoigrib, he came to know that up to that time he had taken no *chela*. He also said that Hoigrib told him that Roghunundun was his *gurubhai*. Another witness (No. 5) was Roghunundun's mokhtar. He said Hoigrib did not adopt any *chela*, but he could not when asked explain his reason for making that statement. Witness No. 6 said that if the appellant was made a *chela* he must have known it (his reason for it apparently being his having gone to the *muth* frequently in Hoigrib's time). Several other witnesses gave similar evidence [855] that the appellant was not made a *chela*; if Hoigrib had made a *chela* they must have known it. Witness No. 8 said that he had heard from Hoigrib that Roghunundun was his *gurubhai*.

The appellant's evidence of his going to Benares to be educated was supported by two witnesses who were examined there under a commission. One was the son of Isri, the *pundit* to whose house the appellant went, who was dead. He said the appellant used to send letters to Hoigrib, in which he addressed him as his *guru*, and he also received letters from Hoigrib, in which the latter styled him as his *chela*. The other witness said he saw the appellant at Benares with Isri Pundit. Nothing was elicited from either of these witnesses which affected his credit. The

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High Court said that the story about the absence of the appellant at Benares and the pilgrimage was a very doubtful one, and if it was to be believed it might have been much more fully proved. This does not appear to their Lordships to be a satisfactory way of dealing with this evidence.

The next question is the adoption of Roghunundun by Chaturbhuj. This is important, because if he was not adopted he was not a *gurubhai* of Hoigrib, and according to the custom was not entitled to succeed him if the appellant had not been adopted. The evidence afforded by the so-called will applies to the adoption principally of Roghunundun but also of the appellant. The Subordinate Judge says in his judgment: "The only document filed on behalf of the defence to rebut the evidence as to plaintiff's *chelaship* and to prove that defendant was Hoigrib's *gurubhai*, is a will purporting to be the will of Hoigrib Das, deceased, dated 9th May 1880. Defendant does not claim the property under this will, but tendered it to prove certain admissions of Hoigrib as he did not take any probate." The learned Judges of the High Court seem to treat the will as conclusive. They say: "If Hoigrib made the will in dispute, it is impossible to believe that the plaintiff was ever appointed *chela*, for the expressions used in the will negative any such idea. If the plaintiff was appointed *chela*, it is difficult to see why Hoigrib should have made this will." Their Lordships do not accept this view of the [856] will. They think it is necessary to consider whether, having regard to the other evidence in the case, the statements in the will should be accepted as true. The statements are as follows:—

"That my venerable *guru* had two *chelas*, *i.e.*, the elder Roghunundun Ramanuj Das and the younger myself. That during the last days of my *guru* the said Roghunundun having gone on pilgrimage and I having remained in my own *muth* and rendered help to the best of my ability in the matter of *sheba* and other services to my *guru* the said *mohant* and to Jagannath Mahaprobhu my *guru* the said *mohant* became satisfied and gave me the *mohantai kanthi* in the presence of all the *santhas* aud *mohants* of Puri in accordance with the custom prevailing from before and gave me permission to become *guddi-nashin* (to succeed him as the *mohant*, after his death. Some time after my *guru* having died I became the *guddi-nashin* and have been duly managing all affairs. In the meantime my elder *gurubhai*, the said Roghunundun Ramanuj Das, having returned from pilgrimage wanted to have from me some position of authority. Thereupon I appointed him as the principal *pujari* to perform the *puja* services of Sri Roghunathji Thakoor, the presiding deity in that *muth*, and also as my representative in many matters to be done by me. . . . . He has up to this time been satisfactorily discharging all those duties and he is virtuous and is one of the heirs of my *guru*. His character has given satisfaction to me, to other *santhas* and *mohants*, and to all persons young and old living in the *muth*. I had intended to bring a Brahmin boy from the North-West Provinces and adopt him as my *chela*, but my body having been diseased from before, and of late there having been an aggravation of the disease, my life is in danger. So in the presence of Mohun Das, Mohant of Sri Math, Mohant Narain Das, Mohant Anirudha Das, Mohant Baroda Ramanuj Das and Adhikari Komul Narain Ramanuj Das, all belonging to our sect, and with their advice, I have made this arrangement that after my death my *gurubhai* the said Roghunundun Ramanuj Das shall be my successor and heir and shall be the occupant of the *guddi* of this *muth*. He will also be the owner. . . . . And the Brahmin boy from the North-West whom I intended to adopt as my *chela* is one Bhagaban Dobey, the

son of Sanman Dobey, resident of Mouzah Tewaripore, pergunnah Kanda, zillah Ghazipore in the North-Western Provinces. If hereafter he comes and agrees to become a *chela* then my *gurubhai*, the said Mohant Roghunundun Ramanuj Das, will duly adopt that Bhagaban as his *chela*, and if after being adopted as *chela* he the said Bhagaban proves to be of good character, then after the death of Roghunundun he will be Roghunundun's heir and the *mohant* of the *muth*."

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The statement in this document that Chaturbhuj had two *chelas* and that Roghunundun was Hoigrib's *gurubhai* is directly opposed to the statement of Chaturbhuj in his petition of the 6th May 1861, his deed of the 21st August 1862, and his petition [857] of the 27th March 1867. and to the petition of Hoigrib of the 28th July 1873, in which Hoigrib says: "My *guru* had no other *chela* besides myself." The statement that during the last days of my *guru* the said Roghunundun having gone on "pilgrimage" is contrary to Roghunundun's deposition in the certificate case on the 28th July 1873 in which he says: "Before the death of Chaturbhuj I used to do the duties of *pujari* in the *muth*. I lived in the *muth* up to the death of Chaturbhuj." Apparently it was thought necessary to state the pilgrimage to account for Hoigrib becoming *mohant*. Then the statement of the intention to bring Bhagaban Dobey from the North-Western Provinces and adopt him as his *chela* cannot be true if the evidence of the appellant's witnesses who say they were present at his adoption is true, As to these witnesses the Subordinate Judge says: "It has not been shown that plaintiff's *mohant* and *adhikari* witnesses have connections with plaintiff or with *mohant* Uttarparsa *muth*; and knowing the jealousy with which Baishnabs regard men who do not belong to their sect it does not appear why these men should swear to a daring falsehood and accept one as a member of their class who did never go through any of the rites necessary to make a Baishnab, and not only so accept him but invest him with a character by a series of false and perjured statements which will make him not merely a Baishnab but give him the highest position which men of their sect can attain." Their Lordships think this observation has great weight. The document is not a will, it has no testamentary effect; it is simply a statement by Hoigrib, and when compared with the other evidence is not in their Lordships' opinion entitled to credit. The evidence of Roghunundun's witnesses as to his adoption by Chaturbhuj does not appear to be of any value.

The Subordinate Judge was of opinion that the will was not the will of Hoigrib. The High Court appears to have thought that the only question with regard to the will was whether it had been satisfactorily proved. They found "as a fact that the will was the will of Hoigrib." And if their Lordships rightly understand their judgment they thought this would be an answer to the appellant's case, and that it was unnecessary to consider whether the statements in it were true.

[858] It remains to consider the question of leprosy. Upon this the Subordinate Judge and the High Court also differed. The remark of the Subordinate Judge as to the appellant's *mohant* and *adhikari* witnesses, before quoted, is applicable to this question. It is improbable that the *mohants* and *adhikaris* would have taken part in the ceremonies of adoption—religious ceremonies—if it were known or there were reason for thinking that Hoigrib was afflicted with leprosy which disqualified him from performing those ceremonies. In order to disqualify from making an adoption the leprosy must be of a virulent form. In this case there is no medical evidence, and there is evidence that

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Hoigrib till a few days before his death performed ceremonies which, if he was suffering from leprosy, he was incapable of performing. It was argued that no one would like to interfere, but it may reasonably be thought that there would have been some remonstrance or attempt to persuade him not to perform the ceremonies by some of the persons around him or by *mohants* or *adhikaris* of other *muths*. The conclusion of their Lordships from the evidence is, that Hoigrib was not disqualified by leprosy from making an adoption; that the appellant was validly adopted as his *chela* by Hoigrib, and that Roghunundun was not a *chela* of Chaturbhuj. What was done after Hoigrib's death could not deprive the appellant of his right to succeed as *mohant*, or give a title to Roghunundun. There was no custom to authorize the choice of a *mohant* in that way. In the view which their Lordships take of the will they do not feel called upon to decide whether or not it was made by Hoigrib, upon which question the High Court and the Subordinate Judge have differed.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court with costs, and to affirm the decree of the Subordinate Judge. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Wrentmore & Swinhoe.*

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22 C. 859.

[859] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

AUBHOYESSURY DABEE (*Defendant*) *Judgment-debtor v.* GOURI SUNKUR PANDAY (*Plaintiff*) *Decree-holder.** [27th May, 1895.]

Execution of decree—Decree for payment of money by instalments on specified dates—Charge—Transfer of Property Act (IV of 1882), ss. 67, 99, 100—*Consent decree—Separate suit.*

Where by a consent decree it is ordered that payment of the decretal amount be made by instalments, and that the properties set forth in a schedule annexed to the decree stand charged with payment of the said instalments, the said properties cannot be sold in execution of the decree, but a separate suit must be brought under s. 67 of the Transfer of Property Act.

[F., 28 A. 58=2 A.L.J. 479=A.W.N. (1905) 189; 22 C. 903 (908); R., 35 C. 61=6 C. L.J. 320 (F.B.)=11 C.W.N. 1011; 5 O.C. 9 (11); D., 4 Ind. Cas. 606=3 S.L.R. 120; 14 Ind. Cas. 29 (30); 13 C.W.N. 787 (790).]

THE plaintiff, Gouri Sunkur Panday, having instituted a suit in Calcutta against Ranee Aubhoyessury Dabee, a decree by consent was made on the 29th May 1893, by which it was ordered that the defendant was to pay to the plaintiff the sum of Rs. 1,68,122-15-0 by instalments, and that the said sum should be a charge on certain immoveable properties of the defendant set out in a schedule attached to the decree. In default of payment of any instalment the plaintiff was to be at liberty to execute the decree in respect only of the instalment falling due and remaining unpaid. The defendant made default in payment of the first instalment.

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* Appeal from Original Order No. 87 of 1895 and Rule No. 677 of 1895.

Subsequently, on the application of the plaintiff, the decree was transferred to the Court of the Subordinate Judge of Goalpara at Dhubri for execution. The Subordinate Judge ordered the properties to be sold. The defendant appealed to the High Court against that order, and obtained a rule calling upon the plaintiff to shew cause why execution of the order should not be stayed until the hearing of the appeal. The appeal and the rule came on for hearing on the 2nd May 1895.

The Officiating Advocate-General (Sir *Griffith Evans*), Mr. *S. P. Sinha* and Babu *Durga Mohun Das*, for the appellant.

Mr. *C. P. Hill*, Mr. *Douglas White* and Babu *Surendra Nath Roy*, for the respondent.

[860] The *Officiating Advocate-General.*—This case is governed by ss. 99 and 100 of the Transfer of Property Act. The consent decree creates a charge over the immoveable property of the judgment-debtor, and under these sections such property cannot be brought to sale otherwise than by institution of a suit under s. 67 of the same Act. Section 100 places the owner of a charge in the same position as a mortgagee under s. 99; and the policy of the law is not to allow any mortgaged property to be sold in satisfaction of a decree not arising under the mortgage. It used to be a common thing for mortgagees to sell, not under a mortgage decree, but under ordinary money decrees. The owner of the charge may attach the property subject to the charge, but s. 99 prevents him from selling it.

Counsel then referred to Ghose on Mortgages, 2nd Edition, note to s. 99, p. 498; s. 228 and cases cited thereon in O'Kinealy's Civil Procedure Code; *Jadub Lall Shaw Chowdhry* v. *Madhub Lall Shaw Chowdhry* (1). In *Azim Ullah* v. *Najm-Un-Nissa* (2), the judgment says: "A suit under s. 67 (Transfer of Property Act) is a suit that can be brought by no person who is not a mortgagee of property." But s. 100 shows that the provisions of the Act apply to a charge as well as a mortgage. As far as estoppel is concerned, I am not estopped by the consent decree. There is nothing in this decree which can be construed as an order for sale. [The cases of *Durgayya* v. *Anantha* (3) and *Vigneswara* v. *Bapayya* (4) cited in the Court below, and Whitley Stokes' Anglo-Indian Codes, Vol. I, p. 734 were also referred to.]

Mr. *Hill*, for the respondent.—The consent decree estops the appellant from raising any question as to irregularity under s. 99 of the Transfer of Property Act. In the next place the charge created by the consent decree is not a charge under s. 100, but virtually a decree under s. 67 of that Act. In *Jenkins* v. *Robertson* (5) it is laid down that a decree obtained by arrangement between the contending parties, the Court bestowing no judicial examination on the merits of the question, can never be **[861]** *res judicata.* But whether this is correct is doubtful. In *The Bellcairn* (6), Lord Esher, M. R., says: "When at a trial the Court gives a judgment by consent of the parties, it is a binding judgment of the Court." *In re South American and Mexican Company* (7) decides that a judgment by consent is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. Lord Herschell, L. C., says: "The truth is a judgment by consent is

(1) 21 C. 34. (2) 16 A. 415 (417). (3) 14 M. 74.
(4) 16 M. 436. (5) L.R. 1 Sc. A. 117.
(6) L.R. 10 P.D. 161 (165). (7) L.R. 1 Ch. D. (1895), 37 (50).

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intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought out again in a subsequent action." My contention is also supported by the case of *Newington* v. *Levy* (1). The binding force of a decision depends upon general priniciples of law, and not upon s. 13 of the Civil Procedure Code—*Ram Kirpal Shukul* v. *Rup Kuari* (2). The decree is one for sale in execution of the charge. It is not open to the defendant to raise any objection under s. 99 of the Transfer of Property Act. The charge is created by act of Court, not by act of parties ; it is not created by operation of law ; therefore it does not fall within s. 100 of that Act. Execution of that portion of the decree, which regarded the charge, was consented to as well as execution of the rest. Counsel also referred to *Dinendra Nath Sannyal* v. *Chundra Kishore Munshi* (3).

The *Officiatiag Advocate General*, in reply.

JUDGMENT.

The judgment of the Court (NORRIS and GORDON, JJ.) was delivered by NORRIS, J., and omitting the portions not material for the purpose of this report, was as follows :—

The Subordinate Judge's judgment is as follows: "The decree passed by the High Court on the 29th of May 1893 for Rs. 1,68,122-15-0 against Ranee Aubhoyessury Dabee has been sent to this Court for execution under s. 223 of the Civil Procedure Code. Execution has been taken out for **[862]** Rs. 31,077, which amount represents the sum due on account of instalments and interest up to date after deducting sums paid. The judgment-debtor is represented by Counsel and so is the judgment-creditor. The judgment-debtor has objected to an execution order on the ground that the consent decree in the High Court created a charge on the estate of the judgment-debtor, and that a charge having thus been created, the judgment-creditor is precluded from proceeding to execution, but is bound to file a fresh suit under s. 67 of the Transfer of Property Act (IV of 1882). In fact Counsel urges that the judgment-creditor is in the same position since the consent decree was passed that a mortgagee occupied under the Transfer of Property Act. Counsel quoted in support of his plea the following rulings : *Durgayya* v. *Anantha* (4), *Vigneswara* v. *Bapayya* (5), *Jadub Lall Shaw Chowdhry* v. *Madhub Lall Shaw Chowdhry* (6) and *Azim-Ullah* v. *Najm-Un-Nissa* (7). All those rulings referred to mortgagees and mortgages, and in none of them is there anything to support what is urged, *viz.*, that a consent decree is a mortgage. One of these rulings, *viz.*, *Azim-Ullah* v. *Najm-Un-Nissa* (7) seems to the Court to be distinctly against Counsel's plea, in that the judgment lays down that a suit under s. 67 is a suit that can be brought by no person who is not a mortgagee of property. The Counsel for the judgment-creditor has referred the Court to various rulings, the general purport of which is that this Court is not competent to decide such a question as is new before it, *viz.*, as to whether the judgment-creditor should have brought a suit under s. 67 of the

(1) L.R. 6 C.P. 180. (2) 11 I.A. 37=6 A. 269. (3) 12 C. 436.
(4) 14 M. 74. (5) 16 M. 436. (6) 21 C. 34.
(7) 16 A. 415.

Transfer of Property Act or not. Counsel urges that the Court has to act only in a ministerial capacity, and is not competent to deal with this question. It would appear that what is urged by Counsel is correct, and that the Court is confined to execution and to matter arising out of actual proceedings in execution. It is admitted by Counsel for the judgment-debtor that this point, as to whether the judgment-creditor is precluded from proceeding to execution under the consent decree, has already arisen in the High Court. This being so, it seems particularly clear that this Court, apart from [863] other reasons already given, should reject the objection. The result is that execution shall issue according to the prayer of the judgment-creditor."

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Mr. Hill did not endeavour to support that part of the Subordinate Judge's order, in which he held that his functions were purely ministerial, and that he had no authority to adjudicate upon defendant's objection. Sir G. Evans contended that under ss. 99 and 100 of the Transfer of Property Act no order for the sale of the properties could be made, until the plaintiff had instituted a suit under s. 67. Mr. Hill contended that the consent decree had no higher operation than an agreement between the parties, and that upon a true construction thereof the Court ought to hold that the defendant agreed to the sale of the properties set forth in the schedule in default of payment of the instalments.

We are of opinion that Sir G. Evans' contention must prevail.

The decree gave the plaintiff a charge on the defendant's immoveable property, and all the provisions of the Transfer of Property Act as to a mortgagee instituting a suit for the sale of the mortgaged property apply to the plaintiff. One of the provisions of the Act as to a mortgagee instituting a suit is contained in s. 99, which provides that "where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not attaches the mortgaged property he shall not be entitled to bring such property to sale, otherwise than by instituting a suit under s. 67."

Unless the construction of the decree is such as Mr. Hill contends for, it is clear that the plaintiff cannot sell the properties without bringing a suit.

We do not think the decree, which, no doubt, is nothing higher than an agreement between the parties, can be construed as Mr. Hill suggests.

If the decree had said "that in default of payment in Calcutta of the said sums, etc., the same shall immediately become due and realizable by execution *by the attachment and sale of the properties set forth in the schedule*, there might have been some force in the argument.

[864] As the decree stands, the plaintiff can realize the instalments by execution by sale and attachment of any property of the defendant's. But if he wishes to sell and attach the properties charged he must bring a suit.

The appeal must be allowed; no order need be made in the rule; we make no order as to costs.

F. K. D. *Appeal allowed.*

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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

ABILAKH BHAGAT AND OTHERS (*Plaintiffs*) v. BHEKHI MAHTO AND ANOTHER (*Defendants*) AND OTHERS (*Plaintiffs*).*
[25th June, 1895.]

Hindu Law—Mitakshara—Insanity subsequent to inheriting of property—Committee in Lunacy under Act XXXV of 1858, *Mortgage of joint family property by.*

Under the Mitakshara law, a person who has succeeded to the inheritance of property does not lose his right on his becoming insane at a subsequent time.

Ram Sahye Bhukkut v. *Lalla Laljee Sahye* (1), and *Ram Soonder Roy* v. *Ram Sahye Bhugut* (2) distinguished.

Balgobinda v. *Lal Bahadur* (3), *Deokishen* v. *Budhprakash* (4), *Sanku* v. *Pattamma* (5), and *Moniram Kolita* v. *Kery Kolitani* (6) referred to.

The father and head of a joint family under the Mitakshara law having become insane, two of his grandsons, acting as committee appointed under Act XXXV of 1858, mortgaged the joint family property on behalf of the lunatic, with the sanction of the Judge. The mortgagee sued upon the mortgage, and obtained a decree against them both in their own capacity and as guardians of their grandfather. *Held*, that the act of the committee might well be regarded as the act of the father and head of the family, and the debt having been contracted for the benefit of the family the whole family was bound by the mortgage, and decree, and that the sale in execution thereof passed the entire property.

[R., 4 C.L.J. 323 ; 12 O.C. 209 (B.)=3 Ind. Cas. 660.]

THE facts of this case, which are sufficiently set forth in the judgment of the High Court, are shortly these: One Ram Sahye [865] Bhagat, a Hindu governed by the Mitakshara law, after having succeeded to, and for some time separately held his share in, property left by his father, became insane. Two of his grandsons Jugdeo Bhagat and Agam Bhagat, appointed under Act XXXV of 1858 as committee for the lunatic, mortgaged the share on behalf of the lunatic Ram Sahye with the sanction of the District Judge. The mortgagee obtained a decree upon the mortgage against Jugdeo and Agam, both in their own capacity and as guardians of their grandfather. The share was brought to sale and purchased by the mortgagee. The sons of the lunatic and all his grandsons (including Jugdeo and Agam), together with their wives, now bring this suit against the mortgagee, praying among others for a declaration that the share did not pass under the sale; and it was contended on their behalf, (1) that the lunatic had lost his right in the property by reason of his insanity; (2) that there was a partition among his sons, whereby his right, if any, had come to an end; and (3) that the alienation of joint family property by the committee did not bind the whole family. Both the Courts below dealing with the facts found that there was no partition, and that the mortgage was for the benefit of the family, and dismissed the suit.

The plaintiffs appealed to the High Court.

Babu *Nalini Ranjan Chatterjee*, for the appellants.—Ram Sahye on becoming insane lost his right as a coparcener. *Ram Sahye Bhukkut* v.

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* Appeal from Appellate Decree No. 1070 of 1894, against the decree of H. W. Gordon, Esq., District Judge of Sarun, dated the 7th of March 1894, affirming the decree of Babu Anant Ram Ghose, Subordinate Judge of Sarun, dated the 28th of December 1892.

(1) 8 C. 149. (2) 8 C. 919. (3) S.D.A. (1854), 244.
(4) 5 A. 509. (5) 14 M. 289. (6) 5 C. 776=7 I.A. 115.

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Lalla Laljee Sahye (1), *Ram Soonder Roy* v. *Ram Sahye Bhugut* (2). The Mitakshara, chap. II, s. 10, verse 6, lays down that a disqualified person would not get a share if his disqualification arises before a partition. Ram Sahye not being separate from his co-sharers, the rule that property once vested cannot be divested does not apply. Mayne's Hindu Law (5th edition, p. 686), para. 580. Assuming that the lunatic had his right of a co-parcener the mortgage executed by the committee was not binding on the family. The right of the father to bind the family by his acts is a special right built on considerations which cannot exist in a committee appointed to manage his affairs. They had not the power of alienation which was a personal right of the father and not an incident of the right of management.

[866] Babu *Saligram Singh*, for the respondents.—There was a separation in the family after the death of Ram Sahye's father, and the property is not ancestral joint family property. The property vested in Ram Sahye alone and cannot be divested—Mayne's Hindu Law, para. 554 (4th edition). *Moniram Kolita* v. *Kery Kolitani* (3), *Balgobinda* v. *Lal Bahadur* (4), *Deokishen* v. *Budhprakash* (5). The Court having found that the debt was for the benefit of the family it was binding on the family. The present case cannot be called a suit for partition. The cases of *Ram Sahye Bhukkut* v. *Lalla Laljee Sahye* (1) and *Ram Soonder Roy* v. *Ram Sahye Bhugut* (2), do not apply.

Babu *Nalini Ranjan Chatterjee*, in reply.—It should not be assumed that the whole property has already passed to the mortgagees. The question yet to be tried is whether the whole or the portion of the property of the lunatic only passed under the sale. The bond was in fact executed by two of the junior members of the family and did not bind the family under the law.

The following judgments were delivered by the High Court (PRINSEP and GHOSE, JJ.) :—

JUDGMENTS.

GHOSE, J.—The facts out of which this appeal arises are shortly these: One Chuturee Bhagat died, leaving two sons, Ram Sahye and Sheo Sahye, who succeeded to his estate; and there is no question in this case that they held separately the properties inherited by them. Subsequently, in or about the year 1838, Ram Sahye became insane. He left three sons Abilakh, Dukhit and Dilchand. The last died without any issue, and the surviving sons had each two sons, Jugdeo and Denonath (sons of Abilakh), Agam and Brijbehari (sons of Dukhit).

In the year 1871, Jugdeo and Agam were appointed to be Ram Sahye's committee in lunacy under the provisions of Act XXXV of 1858; and these two persons, with the sanction of the Judge previously obtained, mortgaged the property in suit in favour of the defendant. This mortgage does not appear to have been executed in their own behalf, but on behalf of the lunatic **[867]** only; but however that may be, the mortgagee sued them on the mortgage, and a decree was obtained in 1882 against them both in their own capacity and as guardians of their grandfather. And in execution of this decree, the mortgaged property was brought to sale and purchased by the defendant in July 1885.

(1) 8 C. 149. (2) 8 C. 919.
(3) 5 C. 776= 7 I.A. 115. (4) S.D.A. (1854) 244. (5) 5 A. 509.

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The present suit was instituted in 1891 by the sons and grandsons of Ram Sahye, and their respective wives; and the object of their suit was to have it declared that Ram Sahye, by reason of insanity, had no right in the property, and that the sale in July 1885 passed no title to the defendants. And among other matters it was alleged in the plaint that Abilakh and Dukhit, tho two sons of Ram Sahye, divided between themselves the whole of the paternal estate of Ram Sahye and entered into possession of their respective shares.

It has been found by both the Courts below that at the time when the succession opened out to Ram Sahye, he was not insane, and that the insanity occurred after the estate had vested in him; that there was no partition of the estate between the two sons of Ram Sahye, and that the debt contracted under the mortgage was for the benefit of the joint family. And the lower Courts have held that the estate having once legally vested in Ram Sahye, he could not be divested of it by reason of subsequent insanity; that the sale in question rightfully passed the property in suit to the defendants; and that neither the sons nor the grandsons of Ram Sahye, nor their respective wives, were in a position to question this sale.

On second appeal to this Court, it has been broadly contended on behalf of the plaintiffs that, upon the happening of insanity, Ram Sahye became disentitled to the property, and that therefore the sale in question passed no title to the defendants. It has been further argued that the loan having been contracted on behalf of Ram Sahye only, and not on behalf of the family, the decree could not bind the joint family property, and that, therefore, the sale was ineffectual; and further, that, though the father Ram Sahye could bind the sons and grandsons by any debt contracted by him, not being of an immoral character, that right was personal to himself and not in his committee in lunacy.

The only authorities for the broad contention of the appellants **[868]** that the learned Vakil on their behalf relied upon in the course of his argument are two decisions of a Divisional Bench of this Court—*Ram Sahye Bhukkut* v. *Lalla Laljee Sahye* (1), and *Ram Soonder Roy* v. *Ram Sahye Bhugut* (2), and the Mitakshara, ch. XII, s. 10, vv. 1 to 6.

Both the cases quoted related to this family. In the first-mentioned case, Ram Sahye, or rather his committee, sued to recover possession of certain property which had passed to the defendants under a sale in execution of a decree for mesne profits passed against the sons of Ram Sahye and Sheo Sahye consequent upon a mortgage executed by them. This Court on a consideration of the Mitakshara, ch. II, s. 10, vv. 1, 3 and 6 held that an insane person loses his right to a share on partition of the family property, and that no decree for recovery of the property could be passed in favour of Ram Sahye which would contemplate a partition between himself and the purchasers of the interest of his coparceners (*i.e.*, his sons); and they accordingly dismissed the suit. At the same time, they expressed the opinion that the position assumed in the mortgage executed by the sons that by reason of insanity Ram Sahye was disqualified from claiming the property, could not "probably" be maintained and "that he was still the owner of the property."

In the other case, the committee of Ram Sahye similarly sued for recovery of a certain share in a property which had been alienated by

(1) 8 C. 149. (2) 8 C. 919.

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one of his Cons. This Court followed the earlier case, and, upon a consideration of the Mitakshara, held that, inasmuch as on a partition between the plaintiff and his sons he would not get any share, and his sons would receive the whole property, and inasmuch as the rights of the sons had been extinguished under the law of limitation, Ram Sahye could not maintain the suit for the purpose of restoring it to the joint family.

It seems to us that these two cases do not support the broad contention of the appellants that upon the happening of insanity Ram Sahye became disentitled to the property. They do not go any further than to hold that upon the event of a partition taking place, the insane father would not get any share, but that the [869] whole property would be received by the sons. On the other hand, it will be observed that this Court in the first-mentioned case practically affirmed the principle laid down in the case of *Balgobinda* v. *Lal Bahadur* (1) which was to the effect that, under the Hindu law, though an insane person cannot succeed to the inheritance of property, a person who has once succeeded to property cannot be dispossessed of it if he subsequently becomes insane. The same view was adopted by a Full Bench of the Allahabad High Court in *Deokishen* v. *Budhprakash* (2), and it was held that when property has once vested by succession in a person, his subsequent insanity will not be a ground for its resumption. To the same effect is the case of *Sanku* v. *Puttamma* (3) decided by the Madras High Court. The principle which underlies these cases is practically the same which was expounded by the Judicial Committee in the well-known case of *Moniram Kolita* v. *Kery Kolitani* (4).

As to the argument based upon the Mitakshara itself, we think it is equally untenable. We do not think that the rules laid down in it go any further than the two decisions of this Court already referred to, nor do we consider that the fact of s. 10, ch. II of the Mitakshara, being headed "on exclusion from inheritance" in any way indicates, as it was argued before us,,that the author meant to lay it down that if a person *after* he has inherited a property becomes insane, he should be excluded from, or deprived of it. On the contrary, the last portion of verse 6 shows that it could not be so. It says, "but one already separated from his co-heirs is not deprived of his allotment." To the same effect is a text of Viramitrodaya, ch. VIII, verse 4, which runs as follows: "The exclusion again of these takes place if their disqualification occur previously to partition (or succession); but not also if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares." (Babu Golap Chandra Sarkar's Translation).

We may take it, therefore, that the property having once vested in Ram Sahye under the law of inheritance, it remained with him [870] notwithstanding his subsequent insanity, there being no partition between himself and his sons and grandsons. The question we have then to consider is whether the defendant acquired a good title to the property under the sale held in execution of the mortgage decree, to which we have already referred.

The mortgage does not purport to be expressly on behalf of the whole family, but it was given on behalf of the father and head of the family under the sanction of the District Judge previously obtained under the

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(1) S. D. A. (1854) 244.
(2) 5 A. 509.
(3) 14 M. 289.
(4) 5 C. 776=7 I. A. 115.

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provisions of Act XXXV of 1858; and it has been found that this was for the benefit of the whole family. The decree that was obtained by the mortgagees was, as has already been mentioned, against Jugdeo and Agam, both in their capacity of committee to the lunatic and in their personal capacity. The decree was passed upon confession of judgment, and this indicates that Jugdeo and Agam meant to execute the mortgage, not simply as committee of the lunatic, but as members of the family. And the debt having been contracted for the benefit of the whole family, we are of opinion that the whole family was bound by the mortgage and the decree obtained thereupon, and that at the sale which took place the entire property passed to the defendant. We do not feel pressed by the argument that the committee of the lunatic could not bind the whole family, for the act of the committee, with the sanction of the Judge, may well be regarded as the act of the father and head of the family; and the debt having been contracted for the benefit of the family, it seems to be clear enough that it is binding upon all.

Upon all these grounds we are of opinion that this appeal should be dismissed with costs.

PRINSEP, J.—I agree in the judgment delivered by my learned colleague that the plaintiffs are bound by the mortgage which has been found to be on account of debts contracted by the father and grandfather of the male plaintiffs, accepted by the manager of the family and sanctioned by the District Judge on behalf of the former, while the female plaintiffs have no right to contest the matter; but I desire to add that I have doubts as to the correctness of the law laid down in the cases cited (I.L.R., 8 Calc., 149, and again in p. 919), for I am inclined to doubt **[871]** whether, as there held, an estate having once vested in Ram Sahye as a member of a joint Hindu family, he can be deprived of his rights in it, because at the time of the determination of his specific right, title and interest by partition he happened to be a lunatic.

It is, however, unnecessary for the purposes of this appeal to determine this point, because the decision of this suit can be properly arrived at otherwise.

The two appeals are dismissed with costs.

S. C. C. *Appeal dismissed.*

22 C. 871.

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22 C. 871.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

JAGERNATH SAHAI AND ANOTHER (*Judgment-debtors*) v. DIP RANI KOER (*Decree-holder*) AND OTHERS (*Auction-purchasers*).*
[4th June, 1895.]

Jurisdiction—Bengal, N. W. P. and Assam Civil Courts' Act (XII of 1887*)*, s. 13, *cl.* (3)*—Civil Procedure Code* (*XIV of* 1882). *s.* 25*—Sale in execution of decree for sale.*

A suit on a mortgage bond, praying for a decree for sale, was transferred under s. 25 of the Civil Procedure Code from the Court of the Second Subordinate Judge to that of the Third Subordinate Judge in the district for trial in that Court. The suit was decreed, and an order for sale was passed by the Third Subordinate Judge. After the sale, an application was made to set it aside on the ground, *inter alia*, that the Court of the Third Subordinate Judge had no jurisdiction to sell the property, it being within the local jurisdiction of the Second Subordinate Judge's Court. The jurisdiction of the Third Subordinate Judge to try the *suit* was not questioned.

Held, that s. 13, cl. (3) of the Bengal, North Western Provinces and Assam Civil Courts' Act (XII of 1887) dealt with matters of this description, and the Court which passed the decree and the order for sale had jurisdiction to hold the sale.

Prem Chand Dey v. *Mokhada Debi* (1) distinguished ; *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (2) and *Tincouri Debia* v. *Shib Chunder Pal* (3) referred to.

[F., 27 C. 272 (275); R., 13 C.L.J. 192 (198)=9 Ind. Cas. 698 (701) ; 163 P.L.R. 1901.]

THIS was an appeal relating to an application to set aside a sale in execution of decree. The suit, which was one for sale under s. 88 of the Transfer of Property Act, was originally instituted in the Court of the Subordinate Judge, Second [872] Court, of the district of Mozufferpore. It was transferred to the Court of the Additional or Third Subordinate Judge under s. 25 of the Code of Civil Procedure by the District Court of Tirhoot. A decree was passed by the Third Subordinate Judge in terms of s. 88 of the Transfer of Property Act, and an order absolute under s. 89 for sale of the mortgaged properties was duly made. In execution of the decree the mortgaged properties were sold by the Court of the Third Subordinate Judge. The present application raised various objections to the sale, but the only objection which is material for this report was that the Third Subordinate Judge had no jurisdiction to make the sale, as the properties sold lay within the jurisdiction of the Court of the Second Subordinate Judge. The objection was overruled in the lower Court.

The judgment-debtors appealed to the High Court.

Babu *Mahabir Sahai*, for the appellant.—The properties in question were wholly within the local jurisdiction of the Second Subordinate Judge ; the Third Subordinate Judge had therefore no jurisdiction to sell them. It was argued in the Court below on the authority of *Maseyk* v. *Steel & Co.* (4), *Kartick Nath Pandey* v. *Tilukdhari Lall* (5), and *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (2) that the Court of the Third Subordinate Judge having passed the decree had power to sell the properties, but those

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* Appeal from Order No. 198 of 1894, against the order of Babu Amrita Lal Chatterjee, Subordinate Judge of Tirhoot, dated the 9th of March 1894.

(1) 17 C. 699. (2) 19 C. 13. (3) 21 C. 639.
(4) 14 C. 661. (5) 15 C. 667.

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cases, as well as other cases on the same point, are distinguishable from the present. In those cases the Court had under ordinary circumstances jurisdiction to entertain the suit, and the question raised was whether, regard being had to s. 223, cl. (*c*), the jurisdiction to sell had been taken away; but in this case the Third Subordinate Judge's jurisdiction was conferred by an order of the District Judge under s. 25 of the Code of Civil Procedure. He was authorized only to try the suit. The trial ended with the decree absolute, and the jurisdiction of the Third Subordinate Judge ended therewith.

Babu *Sarada Charan Mitra*, Babu *Roghu Nandan Prosad* and Babu *Lachminarain Singha* with him, for the respondent, contended **[873]** that s. 13, cl. (3) of the Civil Courts Act of 1887 was an answer to the objection raised. The cases cited in the lower Court's judgment, especially the case of *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (1), and another case *Tincouri Debia* v. *Shib Chunder Pal* (2) more recently decided, are in point. The Court which passes a decree for sale has no doubt a discretion either to sell properties out of its local limits itself or to send the application for sale to another Court within whose jurisdiction the properties lay, under s. 223, cl. (*c*); the Third Subordinate Judge, although he had that discretion, had full jurisdiction to sell.

Babu *Mahabir Sahai* was heard in reply.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit on a mortgage bond in which a decree for sale was applied for under s. 88 of the Transfer of Property Act. The suit was instituted in the Second Court of the Subordinate Judge of Mozufferpore. Owing to pressure of work in that district, an Additional Subordinate Judge or a Third Subordinate Judge was appointed, and by an order passed under s. 25 of the Civil Procedure Code, the suit was transferred to that officer for trial. There is no question that the Additional Subordinate Judge had jurisdiction to try the suit. The order for sale being passed and the sale being held, an objection was raised at the last moment by the judgment-debtor (mortgagor) that the Additional Subordinate Judge had no jurisdiction, inasmuch as the properties which were brought to sale were within the local jurisdiction of the Second Subordinate Judge. We may take it that the Additional Subordinate Judge had no special local jurisdiction over the area within which these mortgaged properties were situated, although this is by no means clear. However, the judgment of the Additional Subordinate Judge now before us in appeal proceeds on that ground. The objection was disallowed. There was another objection raised that the sale should be set aside by reason of an irregularity in the publication of the notification of sale, in consequence of which **[874]** an inadequate price was realized on one of the mortgaged properties. Both these points are taken before us in appeal.

There is no question that the Additional Subordinate Judge had complete jurisdiction to try the suit. The objection raised relates to his jurisdiction to effectuate the order passed by bringing the properties to sale within the terms of s. 88 of the Transfer of Property Act. *Prima*

(1) 19 C. 13. (2) 21 C. 639.

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facie every Court, having jurisdiction to try a suit, has jurisdiction to execute its decree in that suit. It is contended on behalf of the appellant that the jurisdiction conferred on the Court of first instance, in this case by the order of the District Judge under s. 25 of the Code of Civil Procedure transferring the suit for trial terminated as soon as he had passed an order absolute for sale, and that his jurisdiction in regard to execution of that order is limited by any order that may have been passed by the District Judge under s. 13 of the Civil Courts Act (XII of 1887) There are no cases expressly in support of this contention. The judgment of the Full Bench in the case of *Prem Chand Dey* v. *Mokhoda Debi* (1), is not in point. In that case any jurisdiction, which the Court might have had, ceased by reason of an order of Government re-adjusting the local jurisdictions and transferring this particular local jurisdiction to another Court, and this transfer, we may observe from the report, took place before the institution of the suit. There are no doubt some cases which have been decided by this Court, in which it has been held that where a local jurisdiction has, by an order under the Civil Courts Act, been divided between two officers of co-ordinate jurisdiction, such as two Munsifs or two Subordinate Judges in the same district, the jurisdiction of one of these Courts in respect of execution is limited by the area assigned to him by such order. All those cases however were decided under the Bengal Civil Courts Act (VI of 1871). That law has now been repealed by Act XII of 1887, and in re-enacting s. 18 of the Act of 1871, the Act of 1887 has added a clause (3) which apparently is designed to deal with matters of this description. It declares that where civil business in any local area is assigned by the District Judge [875] under sub-section (2) to one of two or more Subordinate Judges, or to one of two or more Munsifs, a decree or order passed by the Subordinate Judge or Munsif shall not be invalid by reason only of the case in which it was made having arisen wholly or in part in a place beyond the local area of that place, or within the local limits fixed by the local Government under sub-s. (1). It cannot be disputed that under the orders of his appointment by the local Government this Subordinate Judge had jurisdiction over the entire district; if he had no such jurisdiction he would not have been competent to try the suit.

We may also observe that in the case of *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (2), and in the case of *Tincouri Debia* v. *Shib Chunder Pal* (3) it was pointed out that in a suit to enforce a mortgage under the Transfer of Property Act it would be impossible to carry out the object of the Legislature if the Court which had jurisdiction to try the suit was not competent to carry out its order within the terms of that Act, and if it were necessary to transfer the decree or order which might be passed making the sale absolute to the various Courts having local jurisdiction over the particular mortgaged properties in order that they might hold the sales. It seems to us that this course was not contemplated by the Legislature and would defeat the object of the Legislature to ensure sale to a mortgagee who might obtain an order under s. 88 of the Transfer of Property Act. We do not mean to be understood as holding that that Court is alone competent to hold the sale in execution of such an order, for in many cases it would no doubt be more convenient and proper that sales of various lots of the immoveable properties mortgaged should be held in the districts in which they are situate. But we think that the sales

(1) 17 C. 699. (2) 19 C. 13. (3) 21 C. 639.

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may also be held by the Court which passed the particular decree and order for sale. No doubt, as has been pointed out by Mr. Justice Ghose, in the case of *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (1) that s. 223, cl. (*c*) of the Civil Procedure Code, leaves it to the discretion of the Court to send the decree for execution to another Court having [876] local jurisdiction, but that is a power which is discretionary and does not affect the jurisdiction of the Court which passed the original order. On these grounds also we think that this appeal must be dismissed.

As regards the second point it is objected that, inasmuch as two of the mortgaged properties are two separate *putties* comprising two separate estates on partition of the parent estate, and the two notifications of sale were published at the same place, those notifications were not affixed on the particular lands as required by law. The appellants' pleader, however, does not contend that neither of these notifications was properly made on one of the *putties* under order of sale. He merely argues on the fact that they were both made at the same place, from which he maintains that one of the notifications was not properly made. But he is unable to tell us to which particular *putty* or estate this objection would apply. Even if we conceded that this was sufficient ground for setting aside the sale, it would not justify an order setting aside the sales of both the *putties*, and as there is no evidence to show to which this objection would apply, it cannot be allowed. Moreover it would amount only to an irregularity, and unless it were found to which *putty* it related, it would be impossible to consider whatever evidence there might be in regard to any substantial injury caused thereby since the *putties* do not represent the same share of the parent estate, and therefore are of different values. It also appears that this objection was taken at a very late stage, and that when objection was taken to the proceeding in question the judgment-debtor did not urge that there was irregularity in the service of the sale proclamation, but referred to other irregularities. The appeal is therefore dismissed with costs.

S. C. C. *Appeal dismissed.*

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22 C. 877.

[877] APPELLATE CIVIL.

Before Mr. Justice Norris, Mr. Justice Ghose, and Mr. Justice Rampini.

SURAT LALL MONDAL AND OTHERS (*Plaintiffs*) *v.* UMAR HAJI AND OTHERS (*Defendants*).* [16th May, 1895.]

Limitation—Suit for damages for misappropriation of crops—Act XV of 1877, *sch. II, arts.* 36, 39, 48, 49 *and* 109.

In a suit for damages for misappropriation of paddy grown on plaintiffs' land, on the allegation that the defendants had wrongfully and forcibly reaped and misappropriated the crops, defendants pleaded limitation of two years under art. 36 of sch. II of the Limitation Act (XV of 1877).

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* Appeal from Appellate Decree No. 2265 of 1893, against the decree of J. Whitmore, Esq., District Judge of Beerbhoom, dated the 24th of August 1893, reversing the decree of Baboo Jado Nath Gossain, Additional Munsif of Ramporehaut, dated the 31st of December 1892.

(1) 19 C. 13.

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Held, by NORRIS and GHOSE, JJ. (RAMPINI, J., dissenting) that the suit was not barred by limitation under art. 36.

Held, by NORRIS, J. (without expressing any opinion on the applicability or otherwise of arts. 39, 49 and 109) that all the conditions existed in this case to bring it within art. 48 of sch. II of the Limitation Act.

Essoo Bhayaji v. *The Steamship " Savitri "* (1) referred to.

Held, by GHOSE, J.—Regarding the suit as one for compensation for the wrongful act on the part of the defendants in cutting the crops on the plaintiffs' ground, art. 39 would save a portion of the plaintiffs' claim from being barred by limitation. If, however, it is regarded simply as a suit for damages for carrying away and misappropriating the crops, the case would fall under art. 49.

Pandah Gazi v. *Jennuddi* (2) dissented from ; *Puddolochan Pardan* v. *Baidyanath Maity* (3) followed.

Held, by RAMPINI, J.—None of the arts. 39, 49 and 109 applied to this case, and the suit was barred by the provision of art. 36.

[F., 25 C. 692=2 C.W.N. 265 (F. B.) ; 5 Bur. L. T. 156=6 L. B. R. 75=17 Ind. Cas. 906; R.. 6 C. L. J. 535 (538) ; 14 C. L. J. 515 (514)=16 C. W. N. 540 (547)=11 Ind. Cas. 729 ; 36 C. 141=9 C. L. J. 109=12 C. W N. 1090 (1092) ; 17 Ind. Cas. 602=23 M. L. J. 618=12 M. L. T. 538=(1912) M. W. N. 1229 ; 14 M. L. J. 225 =25 M. L J. 447=(1913) M. W. N. 869=21 Ind. Cas. 213.]

THE plaint in this suit described it as a " suit for damages for misappropriation of paddy," and alleged that the defendants had wrongfully and forcibly reaped and misappropriated paddy grown on plaintiffs' land from the 17th Aughran 1295 (1st December 1888) to the month of Magh of the same year (13th January to 10th February 1889). The relief prayed for was "damages for misappropriation of paddy together with costs."

[878] The suit was instituted on the 30th November 1891, more than two years but less than three, from the date of the cause of action as given in the plaint. The defendants, among other grounds of defence, pleaded limitation. The pleadings and decision in the Courts below sufficiently appear from the judgment of Mr. Justice Norris.

The lower appellate Court dismissed the suit on the ground of limitation, and the plaintiffs preferred a second appeal to the High Court.

The case was first heard by Ghose and Rampini, JJ., who differed in opinion, and it was thereupon referred to Norris, J., under s. 575 of the Civil Procedure Code.

Babu *Karuna Sindhu Mukerji*, for the appellants.

Babu *Sarada Charan Mitra* and Babu *Chandra Sekhar Mukerjee*, for the respondents.

Babu *Karuna Sindhu Mukerjee.*—The limitation prescribed for a case like this is three years. Either art. 39 or art. 49 or art. 109 would apply. Art. 36 therefore is inapplicable. The plaint alleged that the paddy was " reaped and misappropriated ; " and the issue whether it was " forcibly cut" as well as the expression "cut and carried" in the Judge's judgment point to the application of art. 39. [NORRIS, J.—But the plaint does not allege any damage in trespass.] The case of *Pandha Gazi* v. *Jennuddi* (2) is an authority on a different point. [NORRIS. J.—That case does not seem to throw much light on the present question, and the case of *Essoo Bhayaji* v. *The Steamship " Savitri "* (1), takes a different view.] The unreported decision in *Puddolochan Pardan* v. *Baidyanath Maity* (3) is in point. The case of *Narasimma* v. *Ragupathy* (4) is also an authority for the application of art. 39. So also the case

(1) 11 B. 133.
(2) 4 C. 665.
(3) Rule 381 of 1894, decided 22nd August 1894.
(4) 6 M. 176.

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of *Shurnomoyee* v. *Pattari Sirkar* (1). [NORRIS, J.—But that is not your case in the plaint.] In the view that the suit is for compensation for wrongfully taking specific moveable property art. 49 would apply. In a [879] similar case *Passanha* v. *Madras Deposit and Benefit Society* (2) it was held that art. 49, and not art. 36, would apply. In another view of the case art. 109 may apply. The case of *Essoo Bhayaji* v. *The Steamship "Savitri"* (3) was an action of tort and distinguishable from the present case.

Babu *Sarada Charan Mitra*, for the respondents.—The relief prayed for in the plaint was on the ground of misappropriation and not on the ground of trespass. The case of *Narasimma* v. *Ragupathy* (4), which relates to trespass on immoveable property, cannot apply. As to the application of art. 49, the case of *Essoo Bhayaji* v. *The Steamship "Savitri"* (3) is a complete answer. That article applies to the case of moveable property and not property which was immoveable in its inception, but became moveable by an act of the defendants. Two years' limitation is the general rule, and there are certain exceptions specially provided for. The case of *Pandah Gazi* v. *Jennuddi* (5) is direct authority for the application of art. 36. The case cited from the 11th Volume of the Madras series is not against me.

Babu *Karuna Sindhu Mukerjee* was heard in reply.

The following judgments were delivered by the High Court (NORRIS, GHOSE and RAMPINI, JJ.) :—

JUDGMENTS.

NORRIS, J.—This appeal from appellate decree was heard by Ghose and Rampini, JJ., and those learned Judges having differed in opinion on a point of law the appeal has, under the provisions of s. 575 of the Code of Civil Procedure, read with s. 587, been referred to me by order of the Chief Justice.

The suit was for damages " for misappropriation of paddy, " and the material portion of the plaint, which was filed on 30th November, 1891, was as follows :—

" 1. The plaintiff owns several *lakhiraj* and *mal* land in villages, Bhagobutipur and Bhowanipur, within the jurisdiction of this Court. He holds possession thereof by cultivating the same and enjoying the crops thereof.

[880] "2. The defendants wrongfully and forcibly reaped and misappropriated the paddy grown in the year 1295 on 64 bighas 2 cottas of land, as per schedule, out of the said lands from the 17th Aughran up to the month of Magh that year. The plaintiff, therefore, brings this suit, and prays that a decree may be passed in his favour against the defendants for damages, as per account given below, for misappropriation of paddy together vith costs.

"The cause of action in this suit has gradually accrued from the 17th Aughran 1295."

The 17th Aughran 1295 corresponds to the 1st December 1888.

The account referred to stated the damages the plaintiff had sustained at Rs. 979.

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(1) 4 C. 625. (2) 11 M. 333. (3) 11 B. 133.
(4) 6 M. 176. (5) 4 C. 665.

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The defendants pleaded limitation, denied that the plaintiff had raised any crops as alleged, and denied that they have cut or misappropriated any paddy grown on his land.

Upon these pleadings the Munsif framed the following issues, *viz.*:—

"Whether the claim is barred by limitation? Whether the plaintiff raised these crops? Whether the defendants forcibly cut and took away the crops? Whether the plaintiff is entitled to damages? If so, what is the measure of damages"?

The Munsif makes no reference to the arguments, if any were urged, on the question of limitation; all that he says on this point is, "I do not see how the claim is barred by limitation;" he found it "satisfactorily proved that the land belongs to the plaintiff and he raised the disputed crops."

Upon the third issue the Munsif's judgment is as follows:

"I believe from the evidence adduced on behalf of the plaintiff that the defendants Nos. 2 to 8 cut and took away *dhan* with labourers.

"There is good and reliable evidence on behalf of the plaintiff to show that the defendants Nos. 2 to 8 cut and took away the *dhan*, *i.e.*, they did not cut it with their own hands, but helped in it and are liable. There is good and reliable evidence to shew that the contending defendants were the actual wrong-doers. Some of the contending defendants also took some *dhan*; they had one common object; they made regular *loot*."

The Munsif assessed the damages at Rs. 712, and gave the **[881]** plaintiff a decree for that amount against the defendants Nos. 2 to 8.

The defendants appealed, and the District Judge has reversed the Munsif's decision on the question of limitation, and, without going into the merits, has dismissed the plaintiff's suit with costs.

The District Judge's judgment is as follows:—

"The first ground which is argued is that of limitation, and, in my opinion, the case must be decided upon that ground.

"The suit is for the value of crops cut and carried.

"The case of *Pandah Gazi* v. *Jennuddi* (1) lays down that under Act IX of 1871, the article applicable to this class of cases was not art. 26 (corresponding with art. 49 of the present law), but art. 40 (corresponding with art. 36 of the present law). If this is so, then the present suit, which was filed on the 30th November 1891, is clearly barred, for the acts complained of are said to have taken place from the 17th Aughran to the months of Pous and Magh 1295, and the last day of Magh 1295 corresponds with 10th February 1889. The period limited by art. 36 is two years, and the latest date for the cause of action is about nine and a half months in excess of two years prior to the suit being filed.

"It is suggested however that art. 39 will apply. If so, the period limited is three years. But the only authority for this view is an unreported remark of Field, J., quoted in the note on art. 36 in Mitra's Law of Limitation, to the effect that carrying away of crops may be treated as matter in aggravation of a trespass on immoveable property.

"But I think that an unreported remark by a single Judge in a case, the facts of which are unknown, cannot outweigh the ruling above quoted. Moreover, the remark presupposes a suit for damages for trespass. The

(1) 4 C. 665.

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present suit, however, is not so framed. All that the plaint says is that plaintiff's crop has been cut and carried, that its value was so and so, and that plaintiff asks that he may have a decree for that amount with costs and any other relief.

"Accordingly, I hold that this suit was barred by limitation, art. 36 limiting the period to two years. The appeal is decreed, and the suit is dismissed with costs."

The plaintiff appealed to this Court on the ground that the lower appellate Court was in error in holding that the suit was barred by limitation.

For the appellant it was argued that either art. 39 or art. 49 or art. 109 of sch. II of the Limitation Act (XV of 1877) applied For the respondent it was contended that art. 36 applied.

[882] It was admitted that if art. 36 applied, the suit was barred, and that if either of arts. 39, 49 or 109 applied, it was not barred.

Article 36 runs as follows: "For compensation for any malfeasance misfeasance, or nonfeasance independent of contract and not herein specially provided for, two years from the time when the malfeasance, misfeasance or nonfeasance takes place."

The plaintiff's suit is clearly one "for compensation for a malfeasance, or misfeasance independent of contract;" if therefore there is any other article in sch. II of the Limitation Act specifically applicable to the suit as framed, art. 36 will not apply; if there is not, the article will apply and the plaintiff's suit will be barred.

Any article that gives a period of limitation of three years will avail the plaintiff.

In the view I take of the case it is not necessary to express any opinion as to the applicability or otherwise of arts. 39, 49, and 109.

I am of opinion that the suit falls under art. 48, which is as follows: "For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, three years from the time when the person having the right to the possession of the property first learns in whose possession it is."

The meaning of the words "specific moveable property as used in art. 49 (and they must bear the same meaning in art. 48) was considered by Farran, J., in *Essoo Bhayaji* v. *The Steamship* "*Savitri*" (1). The learned Judge says: "The word 'specific,' applied to property in one's own possession is meaningless. In addition to its medical, natural history and botanical meanings, Webster's Dictionary defines it as 'tending to specify or make particular, definite, limited, precise.' All property in possession of an owner is in this sense specific, as well the corn in his barn as the horse in his stable. Lawyers use the words 'specific property' in a different sense, *viz.*, as equivalent to property of which you may demand the delivery in *specie*. Thus a specific legacy is a legacy [883] 'which can only be satisfied by the delivery of the identical subject.' The phrase is only apt when the thing to which you are entitled is in the possession of some third party. It is in this sense I think that the word specific is used in art. 49."

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(1) 11 B. 133.

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Adopting this explanation art. 48 would then read thus: "For property lost or acquired by theft, dishonest misappropriation or conversion of which the owner is entitled to demand the return in *specie* from the person in whose possession it is, or for compensation for wrongfully taking or detaining such property, three years from the time when the person entitled to demand the return of such property first learns in whose possession it is."

Upon the facts found by the Munsif I am of opinion that the defendants acquired the *dhan* if not by theft or dishonest misappropriation, at least by conversion. Conversion is a wrongful interference with goods as by taking, using or destroying them inconsistent with the owner's right of possession. The defendants clearly "converted to their own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," that is to say certain *dhan*.

The plaintiff was entitled to demand the return of the *Dhan* in *specie* from the defendants, who converted it to their own use, and is entitled to damages for such conversion.

The words "wrongful taking" embrace "a taking by theft, dishonest misappropriation or conversion." The plaintiff could not have learned in whose possession his crops were until they were cut and carried away; the earliest cutting and carrying away was on 1st December 1888, and the suit was instituted on 30th November 1891.

All the conditions, therefore, seem to me to exist to bring the case within art. 48.

I should add that, though crops standing on the land are immoveable property, when severed from the land they are moveable property.

The appeal must be allowed, the judgment of the District Judge set aside, and the case remanded for trial on the merits.

Costs of both hearings in this Court will abide the result.

GHOSE, J.—This was a suit to recover compensation for wrongfully reaping and misappropriating certain paddy grown **[884]** upon the plaintiffs' land. The suit was brought within three years, but beyond two years, of the wrongful act on the part of defendants complained of. Two issues were raised between the parties, as set out in the judgment of the Munsif: *First*, "whether the claim was barred by limitation: *second*, whether the plaintiff raised these crops; whether the defendants forcibly cut and took away the crops; whether the plaintiff was entitled to damages, and, if so, what was the measure of damages."

The Munsif held, upon the evidence in the cause, that the land on which the crops were grown belonged to the plaintiff; that he raised the crops, that the defendants cut and took away the same, and that the claim was not barred by the law of limitation.

On appeal by the defendants, the District Judge was of opinion that the suit was barred by the limitation provided in art. 36 of the Second Schedule of the Limitation Act (XV of 1877); and in support of his view, he referred to the case of *Pandah Gazi* v. *Jennuddi* (1).

On second appeal, it has been contended before us on behalf of the plaintiff that the case falls under arts. 39 and 49 of the Limitation Act.

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(1) 4 C. 665.

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Article 36 runs as follows: "For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for, two years when the malfeasance, misfeasance or nonfeasance takes place;" so that if there is any other article in the Limitation Act specially providing for a case like the one we have before us, the limitation applicable would be that which is prescribed by that article and not art. 36.

Article 39 provides: "For compensation for trespass upon immoveable property three years, the date of the trespass."

Article 48 runs thus: "For specific moveable property, lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same, three years, when the person having the right to the possession of the property first learns in whose possession it is."

[885] Article 49 is as follows: "For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same, three years when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful."

Standing crops have repeatedly been held to be immoveable property and not moveable property, and, therefore, there can be no doubt that, so long as the crops which the defendants cut were on the ground, they should be regarded as immoveable property. But it seems to me that so soon as they were cut, they became moveable property; and the question is whether, when the defendants carried them away, they were such "specific moveable property" within the meaning of art. 49 of the Limitation Act, in respect to which the plaintiff is entitled to come into Court within three years from the time when the said property was wrongfully cut and taken away.

If the crops, after they were cut, were left on the ground and not taken away, I should think that the plaintiff would be entitled to claim compensation as for trespass upon immoveable property within the meaning of art. 39, and the period of limitation would be three years from the date of the trespass. In the present case, however, what the defendants did was something in aggravation of the trespass, that is to say, they carried away the crops and appropriated them to their own use.

It has been said that art. 49 of the Limitation Act refers to property which in its inception is moveable property, but does not assume that character by any act on the part of the defendant. I am unable to accept this view as correct. It seems to me that when the crops after they were cut took the character of moveable property, there is no reason why the plaintiff should not be entitled to regard the said crops as moveable property within the meaning of the said article.

The act of carrying away the crops is an act distinct and separate from the cutting thereof; and in this view, the wrongful act on the part of the defendants in misappropriating the crops would, I think, bring the case within art. 49.

The plaintiff, in this case, does not claim in specific words [886] any compensation for trespass within the meaning of art. 39; but it seems to me that the issues that were framed by the Munsif sufficiently raise this point. If, therefore, the plaintiff is entitled to regard this suit as a suit for compensation for the wrongful act on the part of the defendent in cutting the crops on his ground, art. 39 would save a portion of his claim

(whatever that portion may be) from being barred by limitation. If, however, this be not regarded as a suit for trespass, but simply a suit for damages on account of the wrongful carrying away and misappropriating the crops in question, the case in my opinion would fall under art. 49.

A law of limitation, which curtails the right of the subject, should be construed liberally and not strictly; and putting a liberal construction upon arts. 39 and 49, I should think that the case is not barred by limitation.

As to the precedent referred to in the judgment of the learned District Judge, it would appear that the cause of action to the plaintiff in that case arose when the old Limitation Act (IX of 1871) was in force; but the suit itself was instituted after the new Limitation Act (XV of 1877) had come into operation. The main question that was raised in the case was whether the suit fell under art. 26 or art. 40 of Act IX of 1871. The Small Cause Court, however, referred two questions for the consideration of the High Court—*first*, "whether standing crops are not moveable property under Acts X and XV of 1877; and, *secondly*, whether art. 49 of the present law of limitation (XV of 1877) revives and saves the plaintiffs' right of action from the operation of limitation." It was held by a Divisional Bench of this Court that art. 40 (Act IX of 1871), which provided two years' limitation was applicable and not art. 26, which prescribed one year's limitation; and it was further held that standing crops were not moveable but immoveable property. With reference to the second question that was referred by the Small Cause Court Judge, this Court held that that question did not arise. The learned Judges, however, went on to say that the Court below ought to have decided the question of limitation with reference to Act XV of 1877, and that under art. 36 of that Act this suit was not barred.

[887] It will be found upon an examination of the old and the new Limitation Acts, that there was no such article in the old Act corresponding to art. 49 of the new Limitation Act, and that art. 40 of the old Limitation Act was more comprehensive in its operation than the corresponding art. 36 of the new Limitation Act; for, in this latter Act, we do not find the general words "any wrong" which are to be found in the old Act.

If we confine ourselves to the questions that were submitted by the Small Cause Court in the case of *Pandah Gazi* (1) and the answers that were given by this Court, I do not think that that case should be regarded as any binding authority so far as the question raised in this case is concerned, and I would prefer to follow the unreported decision of this Court in *Puddolochan Pardan* v. *Baidyanath Maity* (2) decided on the 22nd August 1894.

For these reasons I would reverse the decision of the Court below and remand the case for retrial.

I have however the misfortune to differ in this case from my learned colleague, and the case will, therefore, be referred to a third Judge.

RAMPINI, J.—The plaintiff brings this suit to recover damages for paddy wrongfully and forcibly reaped and misappropriated by the defendant.

The District Judge has held that the suit is barred under art. 36, sch. II of the Limitation Act. The plaintiff now appeals and contends that the suit is not barred, inasmuch as the article of the Limitation Act

(1) 4 C. 665.

(2) Rule No. 381 of 1894, unreported.

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applicable is not art. 36, but either art. 39 or art. 49, according to both of which articles the period of limitation is not two, but three years. I am of opinion that neither of these articles will apply.

Article 39 cannot apply, because the plaintiff does not sue for compensation for trespass on immoveable property. He does not even allege that any such trespass took place.

Article 49 cannot apply, because this is not a suit for wrongfully taking or injuring moveable property. Standing crops, which are what the defendant is said to have reaped and **[888]** misappropriated, are not moveable but immoveable property. See the General Clauses Act, I of 1868 and *Gopal Chandra Biswas* v. *Ramjan Sirdar* (1), *Tofail Ahmud* v. *Banee Madhub Mookerjee* (2), *Pandah Gazi* v. *Jennuddi* (3), *Maddaya* v. *Yenkata* (4), *Cheda Lal* v. *Mul Chand* (5).

The learned pleader for the appellant in this case relies on the case of *Shurnomoyee* v. *Pattarri Sirkar* (6), and on the unreported case of *Puddolochan Pardan* v. *Baidyanath Maiti* (7), decided by this Court on the 22nd August last. The facts of the former of these cases are quite different from those of the present case. In that case the defendant had been put in possession of certain land in execution of a decree, and while so in possession he had reaped and appropriated the crop of the land. Afterwards, the decree in execution of which he had been put in possession was set aside, and he was sued for the value of the crop he had appropriated. Hence the suit was held to be one for the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant, and so it was held that the article applicable was art. 109 of Act IX of 1871. But the defendant in the present case was never put in possession of the land on which the paddy he reaped and misappropriated grew; so art. 109 of the present Limitation Act cannot possibly apply.

In the unreported case above referred to (Rule 381 of 1894) it was held that a suit like this comes either under art. 39 or art. 49 of the Limitation Act, inasmuch as the tort complained of by the plaintiff was an act of trespass, and cutting of the crops might be regarded as an aggravation of it, in which case art. 39 would apply, and because crops when cut may be regarded as moveable property, in which case art. 49 would apply. But in the first place, the plaintiff, as already pointed out, has not shaped his case as the plaintiff in Rule 381 of 1894 did.

The present plaintiff has complained of no act of trespass, nor **[889]** has he alleged that any trespass took place. He complains merely of the wrongful conversion of his paddy. In the second place, the plaintiff did not shape his case as one for damages for the misappropriation of moveable property. Both in paras 2 and 3 of his plaint he complains of the defendant having *reaped* the paddy. Moreover, I am of opinion that art. 49 must be meant to apply to cases of damages to property which is from the beginning of a moveable nature, and not to immoveable property which by the wrongful act of the defendant becomes moveable. I think the case of *Pandah Gazi* v. *Jennuddi* (3) is directly in point, and following that case, I would affirm the decision of the learned District Judge and dismiss the appeal. I would add that the case of

(1) 5 B.L.R. 194 = 13 W.R. 275. (2) 24 W. R. 394. (3) 4 C. 665.
(4) 11 M. 193. (5) 14 A. 30. (6) 4 C. 625.
(7) Rule No. 381 of 1894, decided 22nd August 1894.

Krishna Prosad Nag v. *Maizuddin Biswas* (1) has also been cited before us. But it does not appear to me in point. The question decided in that case was one of jurisdiction of the Small Cause Court and not one of limitation.

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Appeal allowed and case remanded.

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22 C. 889.

ORIGINAL CIVIL.

Before Mr. Justice Hill.

ROMANATH BURAL *v.* GUGGODONANDAN SEN AND OTHERS.*
[11th July, 1895.]

Practice—Issue of summons—Summons transmitted to local Court for service—Transmitting Court to consider sufficiency or non-sufficiency of service of summons—Civil Procedure Code (Act XIV of 1882), *s.* 85.

When a summons is issued by one Court to persons resident outside its jurisdiction, and is sent to another Court for service to be effected, it is for the Court from which the summons originally issued to determine whether the service of summons by the Court to which it has been sent for service is sufficient or not.

Nusur Mahomed v. *Kazbai* (2) distinguished.

[**Diss.**, 33 A. 649 (653) = 8 A.L.J. 715 = 11 Ind. Cas. 39.]

THE plaintiffs entered into various transactions with the defendants' firm, and on an adjustment of accounts the sum of Rs. 3,339 was found to be due from the defendants to the **[890]** plaintiffs for principal and interest. A *hatchitta* was given for that amount, and on it the suit was instituted. The defendants, who were the members of a joint Hindu family, resided at Jahanabad, and did not appear to defend the suit.

Mr. *Bagram*, for the plaintiff.—The defendants all reside in one house, outside the jurisdiction of this Court, and within the jurisdiction of the Munsif's Court at Jahanabad. Service on them was effected by the officer of that Court, and the return states "that the summons was considered as duly served." Section 85 of the Civil Procedure Code provides that "the Court to which a summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court." It is for that Court to determine the sufficiency of the service. There is no provision in the Code which requires that both the transmitting Court and the serving Court shall be satisfied as to the sufficiency of the service of summons. The case of *Nusur Mahomed* v. *Kazbai* (2) supports this view.

RULING.

HILL, J.—If the case of *Nusur Mahomed* v. *Kazbai* is to be regarded as laying down the proposition that a Court which transmits a summons under the provisions of s. 85 of the Code of Civil Procedure to another Court for service on the defendant is bound by a return made by the latter Court to the effect that the summons has been duly served, I should feel some difficulty in following it. It was perhaps, however, not intended to

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* Suit No. 179 of 1895.

(1) 17 C. 707. (2) 10 B. 202.

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lay down such a rule without qualification. Section 85 does not, so far as I can perceive, require the Court which served the summons to make a return to the Court from which it issued touching the sufficiency of the service. Sections 87, 88 and 90 seem to afford the only instance in which a return of that nature is prescribed. The declaration provided for by s. 82 relates only to a limited class of cases, those namely in which the provisions of s. 80 have come into play, and cannot, as it appears to me, have been intended, when made by a Court to which a summons has been transmitted for service, to preclude inquiry on the part of the Court issuing the summons as to the sufficiency of the service. The irregularities of "mofussil service" are so numerous, [891] as daily experience shows, that many mischievous results would follow from the adoption of such a rule. The duty of the serving Court under s. 85 is to proceed, on receipt of the summons, as if it had itself issued it, and then to return it, with the record (if any) framed under the section, to the Court from which it originally issued; and in my opinion it then devolves upon the latter Court, when the defendant does not appear, to determine upon the sufficiency of the service before proceeding to try the suit. Such, moreover, has been the practice in the Original Side of this Court; and were I to decide otherwise I should be deciding in contravention of the settled practice of the Court. The plaintiff, therefore, must satisfy me that the summons has been duly served.

Attorneys for the plaintiff: Messrs. *Gregory & Jones.*

C.S.

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22 C. 891.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

W. DUNCAN AND ANOTHER (*Plaintiffs*) *v.* BHOYRO PROSAD, MINOR, BY HIS GUARDIAN AD LITEM (*Defendant*).*
[1st July, 1895.]

Practice—Documents, Inspection and discovery of—Minor—Code of Civil Procedure (Act XIV of 1882), ss. 129, 136.

An infant party to a suit cannot be compelled under s. 129 of the Code of Civil Procedure to give discovery by affidavit and inspection of documents in his possession relating to the suit. To adopt the practice lately introduced in England would be objectionable mainly on three grounds: (1) because it is not contemplated by the Code of Civil Procedure; (2) because it is inconsistent with existing rules of practice; (2) because there is no method of enforcing an order for discovery against an infant.

Waghji Thockersay v. *Khatao Rowji* (1) referred to. *Nathmull Narsing Das* v. *Malharrao Holkar* (2) distingurished.

[R., 26 C. 925 (927).]

THIS was an application referred by the Registrar of the High Court to the Judge sitting in Chambers.

The following was the order of reference:—

"This is an application, under s. 129 of the Civil Procedure Code, for an affidavit of documents by an infant defendant. That section

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* Suit No. 557 of 1894.

(1) 10 B. 167. (2) 19 B. 350.

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provides that the Court may, during the pendency [892] of a suit, "order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit."

"Personally an infant, by reason of incapacity, is deemed not liable to be called upon to make an affidavit of documents, *Curtis* v. *Mundy* (1), nor can the next friend of an infant plaintiff, or the guardian *ad litem* of an infant defendant, be required to make such an affidavit, neither having the *status* of "a party to the suit" within the meaning of the section. The earlier decisions were not uniform. It was held that a next friend could not be compelled to make an affidavit of documents; *Hardwick* v. *Wright* (2), *Lawton* v. *Elwes* (3). Then that a defendant was entitled to an affidavit of documents by the next friend or some one on behalf of the infant plaintiff—*Higginson* v. *Hall* (4), and that the proper course was to stay proceedings until a competent person had made the affidavit—*Prioleau* v. *United States of America* (5). This was dissented from, and it was held that an order for discovery of documents cannot be made against a next friend—*Dyke* v. *Stephens* (6), or against a guardian *ad litem*—*Koylash Chunder Dutt* v. *Prosonnomoye Dossee*, per Pigot, J. (7). See *Ingram* v. *Little* (8).

"The practice as established in England by these later cases is and has been the practice followed in this Court; but I am asked to proceed as if this practice had been superseded by a new rule passed under the English Judicature Act, by which the procedure as to discovery and inspection of documents under that Act is made applicable to "infant plaintiffs and defendants, and to their next friends and guardians *ad litem*."

"The rule laid down in O. 31, rule 29, Supreme Court Rules, Annual Practice, 1895, p. 651, undoubtedly renders persons under disability, as well as their next friends and guardians *ad litem*, liable to be called upon to make discovery of documents. What course the Courts in England may adopt for the purpose of giving effect to this rule is not yet known, but the rule itself has not been extended [893] to this country, and, until it is, we can only proceed under s. 129 of the Civil Procedure Code, which is restrictive in its terms, so as to exclude a person not a party to the suit, though he may be conducting the prosecution or defence of the suit on behalf of an infant party. An order for discovery of documents by an infant party has never yet been made. If such an order could now be made, without the larger powers given by the Courts in England by the new rule to which I have been referred, it may be expected to prove infructuous, as it could not be enforced against the infant personally, or against the person acting in the suit on his behalf.

"The application must therefore be refused. I can make no order as to costs, but the question of costs will be reserved to be dealt with by the Court at the hearing of the suit.

"This application was disposed of two weeks ago. Messrs. Dignam and Co., now ask that it may be referred to the Judge in Chambers under rule 3 of the rules of 9th July 1886. I have accordingly arranged that the parties shall appear before the Judge in Chambers on Monday next.

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(1) L.R. (1892) 2 Q. B. 178.
(2) 11 Jur. N. S. 297.
(3) 52 L.J. Ch. 399.
(4) L.R. 10 Ch. D. 235.
(5) L. R. 2 Eq. 659.
(6) L.R. 30 Ch. D. 189.
(7) Suit No. 231 of 1885, November 30th.
(8) L.R. 11 Q.B.D. 251.

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"I find that the same qestion has been considered in a recent case reported in this month's number of the Bombay Series of the Indian Law Reports, which I had not received until after I had disposed of this application. and to which I would call attention."

Mr *Graham*, for the applicant.

Mr. *Dunne*, for the infant defendant.

Mr. *Graham.*—In 1895 a rule was introduced in England, order 31, rule 29, Supreme Court rules, which renders all orders for discovery applicable to infants and their next friends and guardians *ad litem*. The practice ought to be adopted in this Court. Unless an infant gives the other side an affidavit of documents, he ought not to be able to obtain one from them. *Nathmull Narsing Das* v. *Malharrao Holkar* (1). It may not be the practice in the Registrar's Office here to do so, but it has never been definitely settled.

[SALE, J.—I do not see how you propose to enforce the order.]

I suggest the way to enforce it would be not to compel the **[894]** opposing party to give discovery or inspection, unless the infant does so. In this suit, if we could get inspection of his documents, there would be an end of the suit. It would be most unfair for us to have to disclose all our documents, while the infant need not do so. The infant in this instance is a member of a Marwari firm, and his gomashta can carry out the order of the Court.

Mr. *Dunne, contra.*—Except perhaps the case reported in the Bombay High Court, there is no authority for the contention of the other side. The new rule in England alters what is a well established practice. The Bombay High Court proceeds on the supposition that the rule in England is to be applied out here. There is no reason why the practice in this Court should be altered. There is a great difficulty in the way of an infant filing an affidavit of his documents. In this case the guardian *ad litem* is not asked to do it. What age is to be fixed at which an infant can do so? In this case the infant is only twelve years of age. In the case of written statements, an infant is especially exempted under Rule 244 of the High Court Rules, Original Side, Bel. R. & O., from being required to do so. It is purely voluntary. How can he be compelled to swear to an affidavit of documents? If an attorney were appointed his guardian *ad litem*, could he be required to swear to the affidavit of documents on behalf of the infant? He would know nothing about them. But an infant is always entitled to an affidavit of documents from the other side. The practice of the Court cannot be changed, except where an express rule is made on the point. *Curtis* v. *Mundy* (2). There are express rules in this Court, which will have to be ignored, before an order of this sort can be made. [SALE, J.—In *Mayor* v. *Collins* (3) the hardship and injustice of the old rule in England are referred to.] Yes, but up to 1895 such a practice as is proposed was never heard of. *Dyke* v. *Stephens* (4). We have yet to see how this rule can be enforced in England.

ORDER.

SALE, J.—An application on behalf of the plaintiffs was made on summons to the Registrar for an order in the usual **[895]** form under

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(1) 19 B. 350.
(2) L. R. (1892) 2 Q. B. 178.
(3) L. R. 24 Q. B. D. 361.
(4) L. R. 30 Ch. D. 189.

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s. 129 of the Code of Civil Procedure, directing the defendant, who is described in the cause title as an infant, to give discovery by affidavit of the documents in his possession relevant to the suit, and also to produce and give inspection of such documents.

In accordance with the usual practice in applications for discovery, no affidavit was used in support, but it was contended that, though the party against whom discovery was sought was an infant, still, having regard to the rule newly introduced by the Supreme Court of Judicature in England (order 31, rule 29, Supreme Court rules) which renders orders for discovery applicable to infant plaintiffs and defendants and their next friends and guardians *ad litem*, the practice should be adopted in this Court of requiring infant parties to suits to give discovery by affidavit.

The Registrar refused the application, and he has furnished a note which gives his reasons for his decision. This note clearly states what has been the practice in this Court with regard to applications for discovery, so far as it affects infant parties or their next friends or guardians *ad litem*. It is shown that it has been expressly decided that a guardian *ad litem* is not a " party " within the meaning of s. 129 and cannot therefore be required to file an affidavit.

A guardian *ad litem*, however, may, under certain circumstances, be made a party for the purpose of obtaining discovery from him. *Waghji Thackersey* v. *Khatao Rowji* (1). On the other hand, no instance is known in this Court of an infant party being required to make an affidavit of discovery.

The application, on a reference by the Registrar, was renewed in Chambers and was adjourned into Court for argument. Counsel have now been heard, and I have been referred to various English authorities on the subject, and also to a recent decision by Farran, J., in the suit of *Nathmull Narsingdas* v. *Malharrao Holkar* (2). It is admitted that the course I am urged to adopt in this case is opposed to the long-established practice of the Court. It is clear, also, that the order which is asked for would, if made, have the **[896]** effect of introducing a novel practice, based on the principle that for the purposes of s. 129 of the Code all distinctions between parties *sui juris* and parties under the disability of minority are to be treated as abolished.

In the case just referred to, an order was undoubtedly made directing an infant defendant to give discovery by affidavit, but, though the learned Judge felt at liberty under the circumstances to depart from the usual practice, it is not clear that in so doing he intended to lay down any general principle. The circumstances of the case were peculiar. The plaintiff took out a summons calling on the defendants to show cause why they should not produce for the inspection of the plaintiff all books, papers, &c., in their possession, power or control, or in the possession, power or control of any person or persons on their behalf.

In answer, it was objected that the defendants, being infants, could not be required to discover by affidavit documents in their possession. It was not denied that documents relevant to the matters in question in the suit were in the possession of the defendants, or of their guardian *ad litem*, and eventually, on the understanding that the guardian *ad litem* was willing to make an affidavit of *discovery* on behalf of the infant defendants, the Court made an order against them, not for *production* as applied for,

(1) 10 B 167. (2) 19 B. 350.

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but for discovery by affidavit, which was in reality to be given by the guardian *ad litem*. It may therefore under the circumstances almost be said that the order as made was invited.

But the practice, for which the sanction of the Court is now sought, seems to me objectionable mainly on three grounds.

In the first place, it does not seem to be contemplated by the Civil Procedure Code; in the next place, it would be inconsistent with several of the existing rules of practice in force in this Court; and, lastly, there would seem to be no means of enforcing orders made in pursuance of such a practice.

Under s. 136 of the Civil Procedure Code a party failing to comply with an order made under s. 129 is, if a plaintiff, liable to have his suit dismissed, or, if a defendant, to have his defence struck out and to be placed in the same position, as if he had not appeared and answered.

[897] The section, moreover, provides that any party failing to comply with an order to answer interrogatories, or for discovery, or production or inspection, which has been served personally on him, shall be deemed guilty of an offence under s. 185 of the Indian Penal Code. These penalties are obviously inapplicable to infants and persons under disability as a class, and it seems reasonable to infer that the Legislature never contemplated or intended that the discretionary powers given by s. 129 should be exercised as against parties under disability. The practice of this Court has proceeded upon this view.

Rule 244 of the High Court Rules, Original Side, Bel. R. & O., p. 145, provides that an infant defendant is not to be required to file a written statement. If an infant defendant is to be considered incapable of filing an answer to a claim, it would seem to be anomalous that he should be required to give discovery by affidavit of documents, or make admissions in answer to interrogatories.

Under Rule 272, Bel. R. & O., p. 152, an order for discovery or production may be enforced by the arrest and committal of the disobedient party. This, again, is not a penalty which would be ordinarily applicable to an infant.

Moreover, Rule 309, Bel. R. & O., p. 163, provides that in no case shall a suit, in which there is an infant defendant, be heard *ex parte*.

The practice now sought to be introduced would seem to be inconsistent with these rules and some others which might be cited, and it is obvious, on a consideration of these rules, as well as of the English authorities which have been referred to, that compulsory orders for discovery or the like against persons under disability must, as a general rule, be incapable of enforcement and nugatory. I have not been referred to any case in this Court, in which the present practice has been found to work hardship or injustice, and as a matter of fact for special cases of hardship special remedies can generally be devised. In my opinion the present practice cannot be effectually altered except by fresh legislation, rendering the powers of the Court under s. 129 applicable to infant parties and to their next friends **[898]** and guardians *ad litem*. As against infant parties, however, who may or may not have attained years of discretion, the exercise of these powers would necessarily depend on the facts of each case. I must refuse this application.

Attorneys for the applicants: Messrs. *Dignam & Co.*

Attorney for the infant defendant: Babu *A. T. De.*

C. E. G.

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Before Mr. Justice Macpherson and Mr. Justice Gordon.

SATISH CHANDRA PANDAY (*Petitioner*) *v.* RAJENDRA NARAIN BAGCHI (*Opposite Party*).* [21st June, 1895.]

Criminal Procedure Code (Act X of 1882), *chap. XII, s.* 145—*Power of a District or Sub-Divisional Magistrate to transfer or withdraw cases, ss.* 192 *and* 528—*Their applicability to proceedings under s.* 145.

A proceeding under chap. XII of the Criminal Procedure Code, is an "enquiry" within the meaning of s. 4 of the Code. The general power conferred by ss. 192 and 528 of the Code upon a District or Sub-Divisional Magistrate to transfer or withdraw any case for enquiry or trial by any Magistrate subordinate to him is not taken away or cut down by anything in s. 145. The words of s. 192 are wide enough to include cases under chap. XII.

[F., 2 C.L.J. 614; 10 C.W.N. 1095 (1098); R., 28 C. 709=5 C.W.N. 749 (752); 31 C. 350 (353); 7 Cr. L.J. 423=11 O.C. 61; 2 L.B.R. 80; Rat. Unr. Cr. Cas. 838.]

THE proceedings in connection with this case under s. 145 of the Criminal Procedure Code were instituted by the Magistrate of the district. The subject-matter of dispute consists of a *chur* and a *dhab* (dried up bed of a river). Two huts were built on the *chur* previously to the institution of the proceedings, and indigo and mustard seeds were sown on portions of it. Each party claimed to have built the huts and sown the seeds, and charged the other with having destroyed the huts. Two cases of unlawful assembly arose out of this disputed possession, and there was a serious case of rioting. Each party engaged *burkandazes* for the purpose of using force and claimed the exclusive possession of the *chur* as against the other. These and other circumstances **[899]** induced the District Magistrate to believe that a dispute likely to cause a breach of the peace existed, and so the proceedings under s. 145 of the Criminal Procedure Code were instituted, and the parties concerned were directed to attend the Court of the Deputy Magistrate and to put in written statements of their respective claims to the land in dispute. The Deputy Magistrate, to whom the case was made over, was a Magistrate of the first class, empowered to make an order under ss. 145, 146 and 147 of the Criminal Procedure Code. After a prolonged enquiry, in which a great deal of evidence was taken, the Deputy Magistrate was unable to satisfy himself as to which of the parties was in possession of the *chur*, and made an order attaching it under s. 146 of the Criminal Procedure Code until a competent Civil Court had determined the rights of the parties thereto; and with regard to the *dhab* (dried up bed of a river) he declared that the second party was entitled to retain possession of it. The first party made an application to the High Court and obtained a rule.

Mr. *C. P. Hill* and Babu *Jogesh Chunder Dey*, appeared for the petitioner.

Babu *Saroda Churn Mitter*, appeared for the opposite party.

Mr. *Hill*.—The District Magistrate who initiated the proceedings should have held the enquiry and made the order. The Deputy Magistrate had no jurisdiction, inasmuch as he was not the Magistrate who made

* Criminal Revision No. 241 of 1895, against the order passed by Babu Girish Chundra Nag, Deputy Magistrate of Maldah, dated the 6th of April 1895.

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the initial order and who was satisfied of the existence of a dispute such as would justify proceedings under s. 145 of the Criminal Procedure Code. My contention is that the Deputy Magistrate who held the enquiry had no competent jurisdiction, and not that there has been a mere irregularity. See Madras High Court Proceedings, Appellate Side, 13th November 1868 (1); *Sufferuddin* v. *Ibrahim* (2). Section 192 is wholly inapplicable to s. 145; the former section applies only to criminal cases, as it occurs in a chapter dealing with offences. Then, again, there has been made out no sufficient and reasonable ground for apprehending a breach of the peace. It is that which is the basis of jurisdiction. See *Anundee Kooer* v. *Sooneet Kooer* (3), *Munglo* v. *Durga Narain Nag* (4), **[900]** *In the matter of Kunund Narain Bhoop* (5), *Damodar Mohapatro* v. *Shamanund Dey* (6), *Dhonput Singh* v. *Chatterput Singh* (7).

Babu *Saroda Churn Mitter, contra.*—Section 192 does apply to s. 145. See chap. XLIV of the Criminal Procedure Code, s. 528, also chap. XLV, s. 529, cls. (*f*) and (*i*), and also s. 537. These cases under s. 145 are frequently transferred. If the Magistrate who initiates proceedings is transferred are the proceedings to commence *de novo*? [MACPHERSON, J.—You need not trouble about the point as to whether there was an apprehension of the breach of the peace].

The judgment of the Court (MACPHERSON and GORDON, JJ.) was as follows:—

JUDGMENT.

This is a case under s. 145 of the Criminal Procedure Code. The District Magistrate made the initial order stating that he was satisfied of the existence of a dispute likely to cause a breach of the peace, and directed the parties concerned in it to attend the Court of a Subordinate Magistrate and to put in written statements of their respective claims to the land which was the subject of dispute.

The Magistrate to whom the case was made over was a Magistrate of the first class empowered to make an order under ss. 145, 146 and 147, and he, after a prolonged enquiry in which a great deal of evidence was taken, being unable to satisfy himself as to which of the parties was in possession, made an order under s. 146 attaching the property until a competent Civil Court had determined the rights of the parties thereto.

On a rule obtained by the first party, Rajah Satish Chandra Panday, Mr. Hill contends, first, that the Magistrate who held the enquiry directed in s. 145 and made the order under s. 146 had no jurisdiction, as he was not the Magistrate who made the initial order and who was satisfied of the existence of a dispute such as would justify proceedings under s. 145. In other words, that the jurisdiction to make an order under ss. 145 and 146 is personal to the Magistrate who initiates the proceedings: second, that the initial proceeding under **[901]** s. 145 is defective, inasmuch as it does not set out any reasonable or sufficient ground for the belief that a breach of the peace was imminent if proceedings under the section were not taken; third, that the *dhab*, concerning which the Magistrate has made an order maintaining the possession of the second party, was not included in the land in dispute, and concerning which the parties were directed to put in written statements.

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(1) 4 M.H.C. App. 20. (2) 3 C. 754. (3) 9 W.R.Cr. 64.
(4) 25 W.R.Cr. 74. (5) 4 C. 650. (6) 7 C. 385.
(7) 10 C. 513.

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The first contention is, we think, erroneous. Section 530 declares that if a Magistrate, not duly empowered by law, makes an order under chap. XII his proceedings shall be void; but this we think clearly refers to a Magistrate who is not a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class. The Code contains provisions for the transfer by a District or Sub-Divisional Magistrate of any case of which he had taken cognizance for enquiry for trial to any Subordinate Magistrate duly empowered to deal with it (s. 192); for the withdrawal by a District or Sub-Divisional Magistrate of any case which he had made over to any Magistrate for enquiry or trial, and the making over of such case to any other competent Magistrate for enquiry or trial (s. 528); for the inquiry into, or trial of, any case in which the Magistrate who has heard the whole or part of the evidence ceases to exercise jurisdiction and is succeeded by another Magistrate (s. 350). The general power conferred upon a District or Sub-Divisional Magistrate to transfer or withdraw any case for enquiry or trial is not, we think, taken away or cut down by anything in s. 145. A proceeding under chap. XII is an enquiry within the meaning of s. 4 of the Code, nor can we see any reason for putting upon s. 145 the narrow construction contended for. If that construction is right, it would follow that if the Magistrate who made the initial order died, or was transferred, or was incapacitated from any cause for going on with the enquiry, the proceeding must drop. This would frustrate the whole object of the section, which is to prevent a breach of the peace by determining, if possible, the fact of actual possession at the time when the order for enquiry was made. The power of transfer conferred upon Magistrates and Sub-Divisional Magistrates is a general power, and unless cases under chap. XII are expressly excluded, it **[902]** must extend to them also. It is argued that s. 192 applies only to criminal cases, as it occurs in a chapter which deals with offences, and the preceding section relates to the cognizance of offences. The words are, however, quite wide enough to include cases under chap. XII. We may observe also that in the Code of 1872, s. 44, which is the section corresponding to s. 192, provided only for the transfer of "criminal cases." By the amending Act XI of 1874 the word "criminal" was struck out, and it has been omitted from all the subsequent enactments.

As regards the second point, we think it unnecessary to refer to all the cases which have been cited, as we think that the Magistrate in his preliminary order under s. 145 set out ample grounds to justify proceedings under that section. Neither party showed, or even alleged, that the Magistrate had been misled in the information on which he acted, and that there was no danger of a breach of the peace arising from the dispute. The third contention has no solid foundation, and the objection is not the one which coming from the petitioner we can listen to. The proceeding itself leaves it doubtful whether the *dhab* was included in the disputed land, but the map which the Magistrate attached to it showed that it was included. In the course of the enquiry the second party objected to the inclusion of the *dhab*, but the first party insisted that it was part of the land in dispute and covered by the proceeding, and it was so treated in the inquiry. Now that possession has been proved to be with the second party, the first party brings forward this objection, which under the circumstances we cannot but call impudent.

It has also been urged that the Magistrate ought to have found on the evidence that the first party was in possession. This is a matter which

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we decline to go into. The Magistrate has criticised the whole evidence on both sides, and says he cannot satisfy himself as to which party is in possession. Under these circumstances he has made the order which the law empowers him to make. The rule is discharged.

S. C. B. *Rule discharged.*

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22 C. 903.

[903] ORIGINAL CIVIL.

Before Mr. Justice Hill.

MATANGINI DASSEE *v.* CHOONEYMONEY DASSEE AND OTHERS.*
[12th July, 1895.]

Execution of decree—Charge for maintenance created by a decree—Charge how enforced—Transfer of Property Act (IV of 1882), *ss.* 67 *and* 99—*Civil Procedure Code (Act XIV of* 1882), *s.* 244 (*c*)—*Separate suit.*

Where a decree, after declaring the amount payable to the plaintiff in respect of future maintenance, and that it should be a charge on certain immoveable property which formed a specific item in the general estate of a testator, went on to direct that for the purpose of securing the payment of the future maintenance a deed should be executed in favour of the plaintiff, charging such immoveable property, on her executing a release of all her rights and interest in the general estate. *Held*, that such a charge was properly enforced by a suit brought on the deed, and that it could not be given effect to by proceedings in execution.

Aubhoyessury Dabee v. *Gouri Sunkur Panday* (1) followed. *Ashutosh Bannerjee* v. *Lukhimoni Debya* (2) distinguished.

In a suit by a creditor against the estate of a deceased debtor, who has died leaving a will, his heirs on intestacy do not represent his estate, and the suit is bad unless the estate is represented.

[R., 35 C. 61 (67) (F.B.)=6 C.L.J. 320=11 C.W.N. 1011; 12 C.L.J. 561 (565)=14 C. W.N. 1041=6 Ind. Cas. 627; D., 14 Ind. Cas. 29 (30).]

ONE Bhojokristo Mullick died in 1864 or 1865, leaving him surviving his four sons, Protab Chunder Mullick, Brojogopal Mullick, Aghorenath Mullick and Shama Churn Mullick, his only heirs. Shama Churn Mullick died in April 1874 intestate, leaving him surviving his widow Sidheswary Dassee only. Aghorenath Mullick died in 1866 or 1867, leaving him surviving his sole childless widow and heiress Matangini Dassee, the plaintiff in the present suit. Protab Chunder Mullick died in July 1882, leaving a will, whereby he appointed his brother Brojogopal Mullick and one Hera Lall Bannerjee his executors, and leaving him surviving three daughters Rajaballa Dassee, Soobashiny Dassee and Basunto Coomaree Dassee, and a widow Kaminee Dassee who died in February 1892. On the 14th September 1882 Brojogopal Mullick took out probate of that will, and administered the estate **[904]** of his brother up to and until his own death, which took place on the 21st of August 1887. He left a widow, the defendant Chooneymoney Dassee, an infant son Gopeenath, and four daughters. Chooneymoney became guardian of her infant son. On the 4th of April 1890 Gopeenath died, leaving his mother as his sole heiress. On the 27th of May 1890 Chooneymoney took out letters of administration to Gopeenath's estate. On the death of Brojogopal Mullick, Hera Lall Bannerjee (the other executor) took out probate of Protab

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* Suit No. 425 of 1895.

(1) 22 C. 859. (2) 19 C. 139.

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Chunder's will on the 13th of October 1887, and administered his estate up to and until his own death in September 1893.

In 1879 Matangini Dassee, the widow of Aghorenath Mullick, had brought a suit against Protab Chunder Mullick, Brojogopal Mullick and Sidheswary Dassee, the widow of Shama Churn Mullick, claiming a fourth share of the property of Brojokristo Mullick. A consent decree was made in that suit on 19th May 1879, by which the suit was withdrawn against Sidheswary Dassee, and by which it was directed that Protab Chunder Mullick and Brojogopal Mullick should forthwith, after the filing of the decree, pay to the plaintiff Rs. 12,405 for her absolute use, and also pay her a monthly sum of Rs. 40, and the payment of such sum was to be a charge on the house and premises No. 42, Armenian Street, in Calcutta. It was further ordered *inter alia*, with a like consent, that a duly registered deed should be executed by Protab Chunder and Brojogopal. The deed charging the said house was executed and duly registered on the 15th August 1879 by Brojogopal and Protab Chunder. The monthly sum was paid regularly till August 1887, when, default having been made, the plaintiff Matangini Dassee served notice of execution in the partition suit, claiming Rs. 400 for arrears. The application was not brought on, as the amount was paid. On the 13th January 1893 Chooneymoney Dassee conveyed her undivided half-share in the estate to one Hurro Lall Dutt. Matangini continued to receive her Rs. 40 a month till June 1894, when, default having been made for ten months, she instituted the present suit, praying for a declaration, amongst other things, that in case the amount was not paid, the premises No. 42, Armenian Street, should be sold, and the money paid into Court to her account in the suit from the income of which she should be [905] permitted to draw the sum of Rs. 40 per mensem. The plaintiff made Chooneymoney Dassee and Hurro Lall Dutt defendants as representing the estate of Brojogopal Mullick, and Rajaballa Dassee, Soobashiny Dassee and Basunto Coomaree Dassee were also made defendants on the assumption, but without any allegation, that they represented Protab Chunder Mullick's estate. Previously to the institution of the present suit, on the 13th of February 1893, Basunto Coomaree, by her next friend, instituted a suit in the Hooghly Court against her two sisters, and one Trepura Soondary Dassee (since deceased), praying *inter alia* for the construction of the will of Protab Chunder Mullick, for the ascertainment and declaration of the rights of the parties to the suit thereunder, for a declaration that the trusts under the said will were invalid and inoperative, and that she and her two sisters were equally entitled to the properties belonging to the estate of her father, and for partition of the same, appointment of a receiver, and other relief. At the time of the institution of the present suit, Basunto Coomaree's suit at Hooghly had not come to a hearing, but issues had been settled and two gentlemen had been appointed receivers. Before this case, however, came on for hearing a decree had been made in that suit declaring the respective rights of the parties in the estate.

Mr. *Hyde* and Mr. *Dunne*, for the plaintiff.

Mr. *Caspersz*, for the defendant Hurro Lall Dutt.

Mr. *Abdur Rahman*, for the defendant Chooneymoney Dassee.

Mr. *Chakravarti*, for the guardian *ad litem* of the infant defendant Basunto Coomaree Dassee.

The defendants Rajaballa Dassee and Soobashiny Dassee did not appear.

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Mr. *Caspersz* took the preliminary objection that the present suit related to a matter fully within s. 244 (*c*) of the Civil Procedure Code. The Full Bench case of *Ashutosh Bannerjee* v. *Lukhimoni Debya* (1) has settled that arrears of maintenance should be recovered in execution when there is a precise direction in the decree to pay maintenance on certain **[906]** dates. In that case maintenance appears to have been charged on certain property, but the question was not referred to a Full Bench, whether the fact of the charge being created superseded the remedy by execution. The case of *Mansa Debi* v. *Jiwan Lal* (2) shows that execution was taken out against property so charged. The effect of the charge is merely to give the widow a proprietary interest in certain specified property to which she may resort. In the present case the execution of the deed of charge is expressed to be ancillary to the principal deed in the transaction, namely, the release. It is now fully established that s. 244 is to be liberally construed, and that any suit which interferes with the conduct of execution proceedings by the Court executing the decree is prohibited. *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (3), *Azizan* v. *Matuk Lal Sahu* (4), *Punchanun Bundopadhya* v. *Rabia Bibee* (5). By s. 100 of the Transfer of Property Act, no doubt, the provisions regarding suits relating to sale of mortgaged property are to apply, *so far as may be*, to charges. A case like the present is not contemplated by s. 99 of the same Act, which was enacted to save the mortgagors' equity of redemption. In this case the cause of action is arrears of maintenance. It is not shown that the plaintiff cannot obtain in execution all the relief to which she is at present entitled. It is open to her to attach the undivided eight-annas share which belongs to Protab's estate, and also the eight-annas share which Hurro Lall Dutt has purchased.

Mr. *Hyde*, for the plaintiff.—Under s. 99 of the Transfer of Property Act the plaintiff is precluded from attempting to realize the money on the property charged in any other way than by a suit under the provisions of s. 67 of the same Act. The consent decree in this case provides that the parties should execute a deed charging the property, and in that way, even if in no other, the case is distinct from the Full Bench case of *Ashutosh Bannerjee* v. *Lukhimoni Debya* (1), and the question now raised was not referred to the Full Bench. The plaintiff in **[907]** this case no doubt could proceed to execute against the parties personally, as she did on the previous occasion, and the fact that in her previous application she asked for the sale of the property charged is no ground for the Court to hold that the plaintiff cannot maintain this suit, as in that respect she asked for what she was not entitled to. Section 99 is clear on the point. The case of *Aubhoyessary Dabee* v. *Gouri Sunkur Panday* (6) decided by Norris and Gordon, JJ., on the 27th of May 1895, which is on all fours with this case, supports this contention, and a similar decision has been given in the case of *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (7) decided by Petheram, C.J., and Beverley, J., on the 4th June 1895.

Mr. *Chakravarti* also took a preliminary objection to the frame of the suit. The claim is partially against the estate of Protab; he left a will and appointed two executors; these executors took out probate successively, but they are both dead; therefore, there is nobody to

(1) 19 C. 139. (2) 19 C. 683=19 I.A. 166. (3) 9 A. 33.
(4) 21 C. 437. (5) 17 C. 711. (6) 22 C. 859. (7) 22 C. 813.

represent the estate. The daughters are heirs *ab intestato*; the highest that can be said with regard to them in this case is that they are residuary legatees. But even residuary legatees *qua* legatees do not represent the estate. The suit cannot be proceeded with unless the estate is represented.

Mr. *Hyde*, for the plaintiff, contended that Protab's estate was sufficiently represented as all parties interested in it were before the Court, and that it was unnecessary to have an administrator *ad litem* appointed.

RULING.

HILL, J.—In my opinion the preliminary objection to the frame of the suit taken by Mr. Caspersz on behalf of the defendant, Hurro Lall Dutt, fails. The case of *Ashutosh Banerjee* v. *Lukhimoni Debya* (1), is to my mind clearly distinguishable from the present. There what was decided was that future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit. The question referred to the Full Bench, and decided, had no bearing on the proper method of enforcing a decree charging property to secure future maintenance. Here the decree, which is the **[908]** ultimate foundation of the suit, after declaring the amount payable to the plaintiff in respect of future maintenance, and that it should be a charge upon the house in Armenian Street, a specific item, that is, of the general estate, goes on to direct that for the purpose of securing the payment of the future maintenance a deed should be executed in favour of the plaintiff charging the house, on her executing a release of all her rights and interest in the general estate. This was done, and the present suit is brought on the deed for the enforcement of the charge so created. It appears to me on general principles that it would be impossible to give effect to this charge by proceedings in execution, or in any other manner than by a suit of the nature of the present.

Mr. Caspersz's contention that it would be competent to the plaintiff to proceed from time to time as her maintenance accrued due against the house in Armenian Street by way of execution, is answered by the cases of *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (2), and *Chundra Nath Dey* v. *Burroda Shoondury Ghose* (3), which shew that the proper method of enforcing a decree charging property with the payment of maintenance is by suit.

In relation to the objection taken by Mr. Chakravarti the case must stand over for one month in order that the estate of Protab Chunder Mullick against which the claim is in part preferred may be duly represented.

Attorney for the plaintiff: Babu *Preonath Bose*.

Attorneys for the defendants: Babu *Madhub Chunder Roy* and Babu *Herendra Nath Dutt*.

C. S.

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(1) 19 C. 139. (2) 22 C. 859. (3) 22 C. 813.

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(P.C.) = 22
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[909] PRIVY COUNCIL.

PRESENT :

Lords Watson, Macnaghten, Shand and Davey, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

MAHOMED MOZUFFER HOSSEIN AND ANOTHER (*Plaintiffs*) *v.* KISHORI MOHUN ROY AND OTHERS (*Defendants*).
[5th, and 6th February and 30th March, 1895.]

Sale in execution of decree—Rights of purchasers—Mortgage decree—Purchases in execution by decree-holders—Title of purchaser holding a decree on a mortgage which had preceded his opponent's decree—No notice to mortgagee that mortgagor was only benami-holder for the judgment debtor—Estoppel—Attachment.

The plaintiffs and defendants, either party holding a separate decree against the same estate, had by leave purchased in execution. Both parties claimed the proprietary right and possession, the defendants holding the latter. The first of the decrees in date was the plaintiffs' for money, against the representatives of the deceased owner of the property, which before then had been mortgaged to the defendants by his widow. The plaintiffs obtained only the equity of redemption, their purchase having been of the right, title, and interest. The mortgagees, having got a decree upon their mortgage against the widow, purchased at the sale in execution, and defended the possession which they obtained.

Held, that the defendants, in whose favour the decree had been made upon a *bona fide* mortgage, without notice that the mortgagor had been only holding *benami* for her husband, had the better title; that the High Court had rightly disallowed an objection taken by the plaintiffs, that this defence, as distinguished from the defendants' answer that the widow was the real owner, had not been set up or decided in the Court of first instance; and *held*, that the owner, having in his life-time authorized his wife to hold herself out as proprietor in her own right, could not have succeeded in a suit to disentitle the mortgagees' without proving that they either had taken the mortgage with such notice, or that they had been put upon enquiry; that the same principle applied to these plaintiffs, who had purchased his right, title and interest; and that they were bound equally with him.

Ramcoomar Coondoo v. *Macqueen* (1) referred to and followed, as to the application of estoppel.

An attachment, which had, at one time, prohibited alienation of the property, and on which the plaintiffs relied as having rendered the mortgage invalid, was shown to have been no longer in operation at the time when the mortgage was executed.

[**Rel.**, 35 A. 353 (355, 357) = 11 A.L.J. 371 (375) = 21 Ind. Cas. 619 (620); **F.**, 278 P. L.R. 1913 = 20 Ind. Cas. 291 (293); **R.**, 24 C. 62 (77) (**F.B.**); 33 C. 425 (431) = 3 C.L.J. 205; 39 C. 513 = 15 C.L.J. 369 (375) = 16 C.W.N. 475 (480) = 13 Ind. Cas. 698 (702); 7 A.L.J. 967 = 7 Ind. Cas. 442 (444); 5 C.L.J. 61-N; 7 C.L.J. 644 (647); 16 C.L.J. 185 = 17 C.W.N. 10 = 16 Ind. Cas. 825 (827); 16 Ind. Cas. 792; 10 C.L.J. 150 = 1 Ind. Cas. 264; 35 C. 877.]

[910] APPEAL from a decree (16th September 1890) of the High Court (2) reversing a decree (16th September 1887) of the Subordinate Judge of Dacca.

The plaintiffs, now appellants, and the principal defendants, Kishori Mohun Roy and Gopi Mohun Roy, with the representatives of Baikant Mohun Roy, deceased during this appeal, the only respondents who now appeared, contested the right to a four annas share in a revenue-paying

(1) I.A. Sup. Vol. 40 = 11. B.L.R. 46.
(2) *Kishori Mohun Roy* v. *Mahomed Mozuffer Hossein Chowdhry*, 18 C. 188.

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mehal in the district of Dacca, and an equal right to a share in *lakhiraj* land in Aga Fazle Ali's bazaar in the town.

The plaintiffs, having obtained a decree against the representatives of Moulavi Abdul Ali, deceased in 1869, dated the 28th February 1872, purchased, on the 27th November 1882, at a sale in execution of that decree, the right, title and interest in the above property for Rs. 900. The certificate of sale was dated the 1st December 1883. The Roys, now defendants, on the 13th March 1878, obtained a decree against Amirun Nissa Khatun, the widow of Abdul Ali, on a mortgage dated the 26th May 1873, and purchased at a sale in execution. An order was made on the 21st March 1884 for their possession, which they defended in this suit against the holders of the decree of 1872.

The proceedings, which gave rise to these claims, are stated in their Lordships' judgment, and in the report in I.L.R., 18 Cal., 188.

The principal questions now raised were, first, whether the judgment of the appellate Court, that the Roys, defendants, had become mortgagees of the property *bona fide* and for value, without notice of a defect in the mortgagor's title, was right on the merits, and what was the effect of this not having been expressly averred in the answer, and of no issue having been framed or decided, in the Court of the Subordinate Judge, on this point; secondly, whether the appellate Court had been right in holding that the plaintiffs, or those through whom they claimed, having caused the Roys to believe that the mortgagor had title as owner, estoppel had been occasioned (Act I of 1872, s. **[911]** 115); thirdly, whether an attachment, issued at the instance of the plaintiffs, had been in force prohibiting alienation of the property at the time when the mortgage was executed.

The plaintiffs, claiming as the grandsons of one of Abdul Ali's wife, who died in his life-time, for inherited shares in money due to her estate, obtained a decree against him on the 9th May 1865, and on his death continued the suit against his representatives, one of whom was his surviving widow, Amirun Nissa. The amount of their decree was fixed on the 28th February 1872 at Rs. 62,913, after an appeal to Her Majesty in Council in *Abdool Ali* v. *Mozuffer Hossein Chowdhry* (1). In execution attachment was issued, at the decree-holders' instance, on the 18th May 1872, on the property now in dispute, with other estate formerly belonging to Abdul Ali. On the 11th June 1872 Amirun Nissa filed a claim to the property, alleging that it belonged to her in her own right, having been transferred to her by her late husband in satisfaction of her dower. Her claim was allowed by the District Judge, and the property was released on the 28th December in the same year. On an appeal to the High Court, *Amirun Nissa Khatun* v. *Mozuffer Hossein Chowdry* (2), her suit was remanded for trial on an issue as to whether the property was her own, or had come to her as part of the estate of Abdul Ali. This issue was not tried, a compromise being arrived at, of which the terms are stated in petitions of the 30th May 1874, and her claim was struck off the file. The terms not being fulfilled by payment of certain instalments, the holders of the decree of 1872 issued execution purchasing the right, title and interest in the property sold.

Meanwhile Amirun Nissa, having obtained the release of the property on the 28th December 1872, had mortgaged to the Roys on the date

(1) 16 W. R. P. C. 22.

(2) 12 B. L. R. 65.

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abovementioned. Their decree, the sale, their purchase, and possession followed. The appellants, on the 7th June 1886, brought this suit, claiming that an order made against them under s. 335 of the Civil Procedure Code should be set aside, and that their right to possession should be decreed. They joined, [912] with the Roy defendants, the widow Amirun Nissa, and Abdul Hai, a son of Abdul Ali. But of the rights of this son no question was raised in the High Court.

The defence was that the alleged sale to the plaintiffs had no effect, the property not having been part of the estate of the deceased Abdul Ali, but having been previously transferred by him to Amirun Nissa by deeds, dated the 29th Pous 1266 (1859) and the 25th Kartick 1269 (1862) with possession. This, when it had been released from the attachment, she had mortgaged to the Roys. They relied also on their decree of the 13th March 1878. They further stated that Abdul Ali had caused the belief that his wife was owner, and that the plaintiffs as decree-holders had, in the proclamation of sale of 1st May 1882, entered the defendants' mortgage as a subsisting encumbrance.

The Subordinate Judge, who did not frame any issue as to the defendants having taken the mortgage of the 26th May 1873 *bona fide* for value and without notice of any defect in Amirun Nissa's title, decreed the plaintiff's claim, after taking all the evidence, on the ground that she was only *benamidar* for her husband, and that the property had remained part of his estate subject to his liabilities.

The High Court (PRINSEP and BANERJEE, JJ.) reversed that judgment. Their principal reason was that, as Abdul Ali had allowed Amirun Nissa to hold herself out to all as the owner of the property the mortgagees had as against him, and those claiming through him, a good title as *bona fide* encumbrancers and auction-purchasers in execution of their mortgage decree.

The judgment of the High Court is given at length in the report of the appeal in I. L. R., 18 Calc., 188.

On this appeal,—

Mr. *J. H. A. Branson*, for the appellants, argued that the High Court's judgment should be reversed. In the first place the Court had not given due effect to the attachment of the 18th May 1872, which should have been held to have been still in force at the date of Amirun Nissa's mortgage, the 27th May 1873. The release of the property attached as part of the estate that had belonged to Abdul was, no doubt, ordered by the District Judge on [913] the 28th December 1872, but the High Court had set aside that order, and had, on the 10th July 1873, remanded the suit under s. 352 of the Code of Civil Procedure, Act VIII of 1859, for the trial of an issue as to whether the property held by Amirun Nissa was her own, or had come into her possession as part of the estate of her late husband. Thus the withdrawal of the attachment as to the four annas share did not appear, and its continuance in force was consistent with the appellants, who held the decree of the 3rd May 1872, proceeding to execute that decree, as they did on the 27th November 1882, when they purchased the right, title and interest in the property attached.

The compromise of 1874 was followed by Amirun Nissa's suit being struck off the file on the 30th May in that year, and that would seem to make it appear that she had no title to mortgage at that time. On the other hand, the execution proceedings taken by the present

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appellants as decree-holders were sufficiently continuous throughout; while Amirun Nissa's mortgage was on this view of the case in direct contravention of the prohibitory order in force at the time, and, therefore ineffectual. Reference was made to ss. 240, 274, 276, 278 of Act VIII of 1859; to *Gore* v. *Stacpoole* (1), where, in appeal, it was held that a settlement made upon the faith of a final decision of a Court below was still a transaction *pendente lite*, and was subject to all the legal and equitable consequences of an appeal; and to *Dinendronath Sannial* v. *Ramkumar Ghose* (2).

Next, as to attempted purchases or charges, with knowledge of the pendency of litigation as to the property, reference was made to *Naduroo Nissa Bibee* v. *Aghur Ali Chowdhry* (3), *Inderjeet Kooer* v. *Pootee Begum* (4), and *Chunder Coomar Lahoree* v. *Goopeekristo Gossamee* (5). The main question was whether the Roys had taken the mortgage of 1873 *bona fide*, and without notice of the fact that Amirun Nissa was only holding *benami* for her husband, during his life, and holding the property as part of his estate after his death. As had been said by one of their Lordships **[914]** the High Court, having the power to direct an issue on that question, had decided it themselves. But whether the respondents were at liberty to raise the principal point in the case for the first time in the Court of appeal was open to doubt. Again, it was not clear that there was an entire absence of what might amount to notice of a dispute as to the title; and much had been attributed in the judgment of the High Court to the consequences of Abdul Ali's having allowed his wife to hold herself out as the owner of the property. As to the opinion that this would have estopped him from denying his wife's title to mortgage, it was submitted there were no grounds here for the application of the rule in *Ramcoomar Coondoo* v. *Macqueen* (6). As purchasers at a Court sale, the appellants were not necessarily bound by an estoppel, even if it did affect the judgment-debtor, the original owner. The purchaser might have equities against the claimant different from those which affected the former owner. They referred to *Lekhraj Roy* v. *Motee Madhub Sein* (7), where it was held that the rule of law by which an assignee stands in no better position than the party through whom he derives his title, admits of an exception in favour of those who would be themselves aggrieved or defrauded by the party through whom they claim; and to *Lala Parbhu Lal* v. *Mylne* (8), which affirmed that a purchaser at an auction-sale was not as such the representative of the judgment-debtor within the meaning of s. 115 of the Indian Evidence Act I of 1872. *Poreshnath Mukerjee* v. *Anath Nath Deb* (9) was distinguishable.

Mr. *R. V. Doyne*, and Mr. *J. T. Woodroffe*, for the respondents, argued that the question whether the mortgage of 1873 had been taken *bona fide* by the Roys for value, and without notice of any defect in Amirun Nissa's title, had been fully raised on the evidence taken in the lower Court, and had been rightly decided on the merits. Both the Courts below, though they had arrived at different results, had concurred in finding that Abdul Ali had in his lifetime, for his own purposes, concealed that he was the owner of the property. Though there had been no issue **[915]** framed in the first Court as to the question of notice, the plaintiffs

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(1) 1 Dow. H.L.C. 18 (21). (2) 7 C. 107=8 I.A. 65.
(3) 7 W.R. 103. (4) 19 W.R. 197. (5) 20 W.R. 204.
(6) I.A. Sup. Vol. 40=11 B.L.R. 46. (7) 15 W.R. 333.
(8) 14 C. 401. (9) 9 C. 265=9 I.A. 147.

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had proceeded to trial, and the evidence had made it clear that there was not any notice. It had also been rightly held that, as against claimants through Abdul Ali, the Roys had a good title under their decree of the 28th March 1878 as auction-purchasers. The burden had been on the plaintiffs to show that the Roys had notice of Amirun Nissa's being only the *benami* holder for her husband. Far from establishing this, the plaintiffs ought to have known that Amirun Nissa had stated in her petition of compromise in 1874 that the property had been transferred to her by her husband in satisfaction of her claim for dower; and the plaintiffs had accepted the compromise on the basis that this statement was true. In their sale proclamation of the 1st May 1882, they had mentioned as existing this mortgage of the 26th May 1873, to the Roys; and this had reduced the price which they had paid. In connection with estoppel, reference was made to *Ramcoomar Coondoo* v. *Macqueen* (1), and to the judgment in *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (2), where a representative was held bound by the act of the owner. And in *Poreshnath Mukerji* v. *Anath Nath Deb* (3) a mortgagee, who had purchased in execution of his decree upon the mortgage, was held bound by an estoppel that affected the mortgagor.

Mr. *J. H. A. Branson* replied.

JUDGMENT.

Afterwards, on 30th March, their Lordships' judgment was delivered by

SIR R. COUCH.—This is an appeal against a decree of the High Court at Calcutta reversing a decree of the First Subordinate Judge of Dacca in favour of the appellants in a suit brought by them against the first and second respondents, and another respondent, Baikant Mohun Roy, who has died during the appeal, and his representatives have been substituted for him. There were two other defendants who are not respondents, *viz.*, Mussamut Amirun Nissa Khatun, the widow, and Abdul Hai, the son of Abdul Ali, deceased. The facts upon which the question to be determined arises appear to their Lordships to be these: On the **[916]** 9th May 1865 the appellants obtained a decree against Abdul Ali for a large sum of money, from which he appealed to the High Court at Calcutta. That Court affirmed the decree with an immaterial modification. Abdul Ali then appealed to Her Majesty in Council. His appeal was substantially dismissed, but in consequence of certain objections taken by him it was referred back to the High Court to ascertain and declare for what amount the appellants were to be entitled to issue execution under the decree. On the 28th February 1872 a final decree was made by the High Court, by which it was ordered and declared that the appellants were at liberty to take out execution for Rs. 62,913-9-3 with costs and interest.

During these proceedings Abdul Ali died, and Amirun Nissa, for herself and as guardian of her minor sons by Abdul Ali, and Karimun Nissa Khatun, a daughter of Abdul Ali, were substituted in his place in the record as his representatives. On the 18th May 1872 the appellants caused the property in question in this appeal to be attached in execution of the decree, by a prohibitory order, dated the 3rd May 1872, issued out of the Court of the District Judge of Dacca. The order prohibited the

(1) I.A. Sup. Vol. 40=12 B.L.R. 46.
(2) 19 W.R. 292 (296).
(3) 9 C. 265=9 I.A. 147.

judgment-debtors from alienating the property, and all persons from receiving the same by purchase, gift or otherwise. By the Code of Civil Procedure then in force, and by the Code subsequently and the Code now in force, any private alienation of the property attached by sale, gift, or otherwise is made null and void. On the 11th June 1872 Amirun Nissa put in a claim to the property attached, alleging that it belonged to her in her own right, having been purchased by her from her husband.

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On the 28th December 1872 the Officiating District Judge of Dacca delivered his judgment, allowing the claim and directing the property to be released from attachment. The appellants appealed to the High Court against this judgment, and on the 10th July 1873 that Court, considering that the real issue in the case had been misconceived, and that the Judge had not entered into the evidence which was material on the subject to be decided, framed an issue whether the property which had been attached, and was admittedly in the possession of Amirun Nissa, was a property which came into her possession as part of the estate of Abdul [917] Ali, and remanded the case to the Judge of Dacca for trial. The order of the 20th December 1872, releasing the property from attachment, was not set aside; whether it should be set aside depended upon the finding on this issue.

The issue was never tried; Amirun Nissa and the appellants came to a compromise which is contained in two petitions presented to the Court on the 30th May 1874, one by Amirun Nissa and the other by the appellants. The petitions differ slightly in some parts, but are in substance the same, and the nature of the compromise may be taken from the latter. It refers to the decree of the 28th February 1872, the attachment in execution of it, the allowance of Amirun Nissa's claim, the appeal to the High Court and the remand, and states that it was settled by the appellants that they should take only Rs. 89,000 out of the total amount due to them, and prays that the agreement made on the terms settled between the parties "be taken as a part of the original decree, capable of being executed according to the rules for the execution of decrees, that the present claim cases be struck off the file, and that the work of the sale be stopped."

Then follow the terms: Amirun Nissa paid Rs. 9,000 in cash, and was to pay the remaining Rs. 80,000 by yearly instalments extending over a period of fourteen years. Till the realization of that money the attachment in respect of the four annas share of the properties that had been attached, and with regard to which she had put forward her claim, except some property not included in the property now in question, was to subsist, and the attachment in respect of the remaining twelve annas share was withdrawn. It is then said that the four annas share of the other properties in connection with the claim, and of all other properties of Amirun Nissa, whether standing in her own name or in the names of others, and of the properties left by her husband, and obtained by her by right of inheritance from him, was to remain liable for the debts under the decree, and that till the realization of the money due Amirun Nissa, or her heirs or representatives, should not be able to make any sale, gift, or any other kind of transfer of the four annas share so hypothecated. The order of the Court made on the 30th May 1874 on this petition was that "this case be struck off the file." A similar order was made on the other petition.

[918] On the 1st May 1882, on the application of the appellants, a sale-proclamation was issued from the Court for the sale by public auction

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of the property now in question. It stated that the right, title and interest of the judgment-debtors only should be put up to sale, and that these and the incumbrances and other charges on the property were all specified in detail in the schedule against each lot. The lots of this property were Nos. 1 and 2. Under the heading in the schedule "detailed description of encumbrances on the property," there is against each of these lots a statement that Amirun Nissa had mortgaged the property by a deed of mortgage, dated the 14th Jeyt 1280 (26th May 1873) to Kishori Mohun Roy (the first respondent), and that he had instituted a suit against her for the recovery of Rs. 18,719-14-5 out of the mortgaged property, and obtained a decree dated the 13th March 1878. The property was sold on the 27th November 1882, and was purchased by the appellants for Rs. 900. This was a purchase of the equity of redemption. The property was represented by the appellants for the purpose of presenting this appeal to be of a value exceeding Rs. 10,000. A sale certificate was granted to them on the 1st December 1883. They were unable to obtain possession, and the Roys being in possession the appellants, on the 7th June 1886, brought this suit against them, and Amirun Nissa and Abdul Hai, the son of Abdul Ali, to recover possession free of the encumbrances.

The case of the Roys was that Abdul Ali had, before the appellants obtained their decree, sold the properties in suit to Amirun Nissa in part satisfaction of her dower; that she on the 26th May 1873 mortgaged the properties to these defendants, on which mortgage they had sued her and obtained a decree on the 13th March 1878; and that at a sale in execution of the decree they had purchased and been given possession of the properties in suit in March 1884. The mortgage is the same as that mentioned in the sale-proclamation. It has been found by the High Court and by the lower Court that the conveyances by Abdul Ali to Amirun Nissa were *benami*—not in good faith for consideration. But on the 19th February 1864 Amirun Nissa's name was ordered by the Officiating Collector of Dacca to be registered in the Collectorate **[919]** as the owner of the part of the property which was a revenue-bearing estate, and it was not denied that from that time down to Abdul Ali's death in August 1866 all the usual acts of ownership were exercised in her name. She was for all purposes the apparent owner. In the written statement of the defendants they set up the mortgage to them, and said that, according to the terms of the deed, Amirun Nissa received from them a large sum of money as a loan, but they did not aver that the mortgage was taken *bona fide* and without notice of her being a *benamidar*. At the settlement of the issues many were framed, but not one raising this question. If the appellants had intended to raise it, they might have asked for an issue upon it. There being no issue the Subordinate Judge did not take any notice of this question, but it appears to have been raised in the High Court and to have been argued that the defendants, who were there the appellants, were not entitled to succeed, because it had not been raised in the defence or made the subject of an issue. The High Court did not allow this objection, and held that the Roys had a good title as *bona fide* mortgagees and auction-purchasers in execution of their decree. This must now be taken as the fact. Their position is such as is described in the judgment of this Committee, delivered by Sir Montague Smith, in the case of *Ramcoomar Coondoo* v. *Macqueen* (1), where he says: "It is

(1) I. A. Sup. Vol. 40 (43).

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a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it." This principle applies to Abdul Ali, and the appellants are in the same position, as they purchased only his right, title and interest, and are equally bound by it.

[920] The question then is: Had the attachment or prohibitory order any effect upon the mortgage? The order of the District Judge had released the property from the attachment. The High Court, upon appeal, framed an issue and remanded the case for trial of it. The Court did not set aside the order of the District Judge. Whether that should be done depended upon the finding upon the issue which in consequence of the compromise was never tried. The orders of the 30th May 1874 to strike the case off the list of pending suits could not have the effect of reversing the order releasing the property from attachment. The case being before the High Court on appeal, the District Judge had no power to reverse his order. The case had passed out of his hands. But, assuming that the orders of the 30th May were intended to give effect to the compromise, and (although most informal) that they did so, their Lordships are of opinion that the compromise did not operate to revive or restore the attachment, and make it effective upon the mortgage. The liability of Amirun Nissa under the compromise was different from the liability of the representatives of Abdul Ali under the decree of the 28th February 1872. She became personally liable for the payment of the instalments, and all her property was made liable for it. The effect of the compromise was to substitute that liability for the liability under the decree of February 1872 and to put an end to the attachment. The appellants who purchased only the right to redeem the property, and now seek to recover possession of it freed from the mortgage, have failed to show their title to possession, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the plaintiffs: Messrs. *Neish & Howell.*
Solicitors for the respondents: Messrs. *Barrow & Rogers.*

C. B.

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22 C. 921.

22 C. 921.

[921] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

SUJA HOSSEIN *alias* REHAMUT DOWLAH (*Judgment-debtor*) *v.* MONOHUR DAS (*Decree-holder*).* [16th August, 1895.]

Limitation Act (XV of 1877), sch. II, art. 180—Execution of decree—Revivor—Civil Procedure Code (Act XIV of 1882), ss. 223, 230, 248.

A obtained a decree against *B* on the Original Side of the High Court on the 19th December 1881. On the 11th December 1893, the judgment-creditor applied to the Court under s. 223 of the Code of Civil Procedure for "transmission of a certified copy of the decree to the District Judge's Court of the 24 Pergunnahs, with a certificate that no portion of the decree has been satisfied by execution within the jurisdiction" of the High Court, and alleging that the judgment-debtor had no property within its jurisdiction, but had property in the 24-Pergunnahs. The application was headed as an application for execution and was in a tabular form. Upon this a notice was issued under s. 248 (*a*) of the Code, and, the judgment-debtor not having shewn any cause, on the 19th December 1893 a certified copy was ordered to be issued. The certified copy of the decree having been transmitted the judgment-creditor on the 1st March 1894 applied for the execution of the decree to the District Judge. On the objection of the judgment-debtor that the execution was barred by limitation.

Held, that the application of the 11th December 1893 was not an application for execution, and also that the order of the 19th December 1893 was not an order for execution and could not operate as a revivor of the decree within the meaning of art. 180, sch. II of the Limitation Act. There was no necessity for the issue of a notice under s. 248 upon the application to transfer the decree under s. 223 of the Code, and on that application execution could not have been obtained upon the order of the 19th December 1893. The first application for execution was that made on 1st March 1894 to the Court to which the certified copy of the decree was transmitted, and that was not within time. The execution of the decree was therefore barred by limitation. *Nilmony Singh Deo* v. *Biressur Banerjee* (1) followed; *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (2) distinguished.

[R., 8 C.W.N. 575 (577); L.B.R. 1893—1900, 588; 14 Ind. Cas. 277; D., 36 C. 543 (549) = 9 C.L.J. 271 = 1 Ind. Cas. 168.]

THE facts of the case for the purpose of this report appear sufficiently from the judgment of the High Court.

[922] Babu *Nil Madhub Bose*, for the appellant.

Mr. *S. P. Sinha*, with Mr. *H. H. Remfry* and Babu *Dwarka Nath Mookerjee*, for the respondent.

Babu *Nil Madhub Bose.*—The order for the issue of a certified copy of the decree is not an order for execution. Now, the question is whether it has the effect of reviving the decree. I submit not. The correctness of the principle as laid down in the case of *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (2), which has been relied upon by the Court below, has been doubted by Wilson, J., in the case of *Tincowrie Dawn* v. *Debendra Nath Mookerjee* (3). Art. 180, sch. II, of the Limitation Act only protects a decree if there is a revivor; there being no revivor in this case, the execution is barred by limitation.

Mr. *S. P. Sinha*, for the respondent.—The order for the issue of a certificate after notice is an order for execution. The application was for

* Appeal from Original Order No. 329 of 1894, against the order of Babu Purna Chunder Shome, Subordinate Judge of the 24-Pergunnahs, dated the 4th of August 1894.

(1) 16 C. 744. (2) 6 C. 504. (3) 17 C. 491 (497).

execution, and the Court issued a notice under s. 248 of the Code of Civil Procedure. The prayer in the application was for the execution of the decree by transmission under s. 223 of the Code, and the order was made accordingly. When a Court transmits a decree to another Court under s. 223 of the Code it does so for execution. It is only an order of the High Court that can revive a decree of the High Court. See *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (1). The order for the issue of a certificate had the effect of reviving the decree.

The judgment of the Court (NORRIS and GORDON, JJ.) was as follows :—

JUDGMENT.

The material facts of this case, so far as it is necessary to set them out for the purposes of this judgment, are as follows : On the 19th December 1881 the respondent obtained a decree for Rs. 51,242 and costs against the appellant on the Original Side of this Court. On the 11th December 1893 the respondent applied under s. 223 of the Civil Procedure Code for " transmission of a certified copy of the decree to the District Judge's Court of the 24-Pergunnahs, with a certificate that no portion of the decree has been satisfied by execution within the jurisdiction of **[923]** this Hon'ble Court," and alleging that "the said defendant has no property within the jurisdiction of this Hon'ble Court, but has property in the 24-Pergunnahs." This application was headed as follows : " The plaintiffs have obtained a decree in the case mentioned below, and the surviving plaintiff craving to have excution in accordance with Act XIV of 1882, he submits in a tabular form the following particulars in support of his application." Upon this application Sale, J., made the following order : "Let notice issue (returnable four days after service) under s. 248 (*a*) of the Civil Procedure Code." On the 19th December 1893 the learned Judge made the following order : " Let a certified copy issue, no cause being shown." The certified copy of the decree was in due course transmitted to the Court of the District Judge of the 24-Pergunnahs, and on the 1st March 1894 the respondent applied in that Court for execution of the decree by the attachment and sale of certain immoveable property.

On the 1st of June 1894 the appellant filed objections to the execution of the decree, alleging amongst other things that the execution was barred by limitation. On the 4th of August 1894 the Subordinate Judge, after hearing arguments on both sides, overruled the appellant's objections and directed execution to issue. The Subordinate Judge held that the application of 11th December 1893 was an application for execution of the decree, and that the order of Sale, J., of the 19th December 1893, " Let a certified copy issue, no cause being shown," was an order for the execution of the decree made on the application for execution ; and on the authority of the case of *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (1) further held that such an order operated as a revivor of the decree under art. 180, sch. II of the Limitation Act (XV of 1877). In appeal it is contended before us that this view is erroneous.

We are of opinion that the application of the 11th December 1893 was not an application for execution, and we are also of opinion that the order of the 19th December 1893 was not an order for execution. The application of the 11th December 1893 no doubt purports to be made

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(1) 6 C. 504 (510).

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under s. 248 (*a*) of the Code of Civil [924] Procedure, and that section provides that the Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him when more than one year has elapsed between the date of the decree and the application for its execution. In our opinion there was no necessity for the issue of a notice under s. 248. Upon an application to transfer the decree under s. 223, execution could not have been obtained upon the order of the 19th December 1893. The subsequent application to the Court to which the certified copy of the decree was transmitted was necessary, and this we think was the first application for execution. In the case of *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (1), the order relied upon by White, J., as having the effect of reviving the decree within the meaning of art. 180 of sch. II of the Limitation Act, was an order for execution by the arrest of the judgment-debtor, and was made by the Court which passed the decree. The view we take is confirmed by a decision in the case of *Nilmony Singh Deo* v. *Biressur Banerjee* (2).

The appeal must be allowed with costs.

S.C.G. *Appeal allowed.*

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22 C. 924.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

TILUCK SINGH (*Judgment-debtor*) *v.* PARSOTEIN PROSHAD (*Decree-holder*).* [8th July, 1895.]

Limitation Act (*XV of* 1877), *sch. II, art.* 178—*Transfer of Property Act* (*IV of* 1882), s. 89—*Application for an order absolute for sale of mortgaged property.*

An application under s. 89 of the Transfer of Property Act (IV of 1882) to have a mortgage decree for sale made absolute is not governed by art. 178, sch. II of the Limitation Act, 1877. That article is limited to applications under the Code of Civil Procedure. *Baimanekbai* v. *Manekji Kavasji* (3), *Ranbir Singh* v. *Drigpal* (4), approved.

[925] In dealing, however, with such an application, the Court may be guided by considerations as to whether any delay on the part of the mortgagee has not been unreasonable, so as to bring it within the rules applied in such cases by Courts of Equity.

So long as the final order for sale is not passed the suit may properly be regarded as pending.

[**Not F.**, 24 Ind. Cas. 27; **F.**, 25 C. 133 (135); 34 C. 672=6 C.L.J. 119=11 C.W.N. 674; 37 C. 796=12 C.L.J. 328=15 C.W.N. 337 (340)=6 Ind. Cas. 537; 14 Bur. L.R. 323; **Rel.**, 29 C. 651 (653); 8 C.W.N. 102 (104); **Appl.**, 16 C.P.L.R. 114 (117); **Cited**, 2 O. C. 338; **R.**, 27 A. 501=2 A. L. J. 180=A.W.N. (1905), 70; 23 B. 644 (652); 33 C. 867=4 C.L.J. 141; 25 M. 244 (299); 6 Bom. L.R. 1043 (1049); 12 C. P. L. R. 82 (85); 18 Ind. Cas. 457 (459); 4 L. B. R. 83 (85); 6 O. C. 114 (115); 18 C.W.N. 466=20 Ind. Cas. 910.]

THIS appeal arose out of an application for an order absolute under s. 89 of the Transfer of Property Act. The original mortgage-decree

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* Appeal from Order No. 314 of 1894, against the order of W. H. Page, Esq., District Judge of Tirhoot, dated the 18th of May 1894, affirming the order of Babu Shoshi Bhusan Sen, Munsif of Muzafferpur, dated the 24th of February 1894.

(1) 6 C. 504. (2) 16 C. 744. (3) 7 B. 213. (4) 16 A. 23.

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was passed on the 21st July 1887. An application for execution of the decree was made on the 19th July 1890, but it was struck off for default. A second application for execution, dated 16th February 1893, also failed on the ground that the decree had not been made absolute. The present application for an order absolute was made on the 14th September 1893, and the judgment-debtors objected that the application was barred by limitation. Both the lower Courts overruled the objection. The judgment-debtor preferred a second appeal to the High Court.

Babu *Dwarkanath Chakrabarti*, for the appellant.—The application is barred by art. 178 of the Limitation Act. [GHOSE, J.—That article refers only to the Code of Civil Procedure and the Limitation Act; it does not refer to the Transfer of Property Act.] That is the only provision for the applications not expressly mentioned and it was meant to be general. Section 4 of the Limitation Act is wide enough, and the Act was never intended to exclude proceedings under the Transfer of Property Act. The provision of s. 89 of the Transfer of Property Act is of the same class as the provision for an order for sale under s. 284 of the Civil Procedure Code. [PRINSEP, J.—The application under s. 89 is an application pending the suit and not one after the final decree.] The articles in the schedule deal with applications pending the suit. A plaintiff ought to be more diligent in bringing a suit to a termination than in executing a decree. In *Darbo* v. *Kesho Rai* (1), the article was held not to apply to cases where it is the duty of the Court to pass the order without being moved by the party; here it was the duty of the party to apply for an order absolute. The case of *Baimanekbai* v. *Manekji Kavasji* (2) cited in the lower Court's judgment related to an application for **[926]** probate or letters of administration, and was a different case; and the case of *Rambir Singh* v. *Drigpal* (3) was decided upon the ground that art. 178 applied to applications under the Civil Procedure Code only, which does not seem to be correct. The case of *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose* (4) supports my contention. [GHOSE, J.—But that case was dissented from in a Full Bench decision in *Puran Chand* v. *Roy Radha Kishen* (5).]

Babu *Jogesh Chundra Dey*, for the respondent, was not called upon.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

JUDGMENT.

This is a matter relating to the execution of a decree on a mortgage passed under the Transfer of Property Act. It seems that an application for execution of that decree was made and abandoned, and again renewed, without the plaintiff having obtained an order under s. 89 for the sale of the mortgaged properties. On the second application to execute, the mortgagor, judgment-debtor, objected that the decree could not be executed without such an order, and he succeeded in getting the application to execute dismissed on this ground. On this, the mortgagee has applied to have his decree made absolute by an order for sale of the mortgaged properties. The objection was renewed by the mortgagor on the ground that more than three years have passed since the original decree, and that, therefore, the application now made was barred by art. 178, sch. II of the Limitation Act of 1877. Both the Courts have overruled this objection and have concurrently given the mortgagee the order

(1) 9 A. 364. (2) 7 B. 213. (3) 16 A. 23. (4) 14 C. 50. (5) 19 C. 133.

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that he desires. They have both proceeded on the judgment of the Allahabad High Court in the case of *Ranbir Singh* v. *Drigpal* (1), which followed the judgment of the Bombay High Court in the case of *Baimanekbai* v. *Manekji Kavasji* (2). In both these cases, the object of art. 178 was considered. In the Bombay case it was sought to apply art. 178 to an application for probate or letters of administration, and it was there held that that article was limited to applications made under the Code of [927] Civil Procedure. The learned Chief Justice proceeds: "An examination of all the other articles in the second schedule, relating to applications, that is to say, of the third division of that schedule, shows that the applications therein contemplated are such as are made under the Civil Procedure Code. Hence, it is natural to conclude that the applications referred to in art. 178 are applications *ejusdem generis*, *i.e.*, applications under the Code of Civil Procedure. The preamble of the Act moreover, purports to deal with certain applications only and not with all applications." The judgment of the Allahabad High Court, to which reference has been made, is also to a similar effect. In that case, as in this, the application related to an order for sale under a decree passed on mortgage. Mr. Justice Burkitt, after following the judgment of the Bombay Court, pointed out that the Limitation Act was enacted some years before the passing of the Transfer of Property Act, and he says: "I cannot find, nor has my attention been called to any rule of limitation *aliunde* which could be applied to an application under s. 89 of the latter Act. I am accordingly obliged to hold that there is no limitation rule under which the application made by the appellant in March 1890 can be considered to fall." We approve of the view taken in both these judgments of art. 178, and agree that it should be limited to applications under the Code of Civil Procedure. The result, therefore, is that an application, such as that now before us, is not governed by any limitation. We do not, however, mean to say that, in dealing with such matters, the Court will not be guided by considerations as to whether any delay on the part of the mortgagee has not been unreasonable, so as to bring it within the rules applied in such cases by Courts of Equity. We may further observe that no final order for sale having been passed, this suit may properly be regarded as being still pending. The appeal is, therefore, dismissed with costs.

S. C. C. *Appeal dismissed.*

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22 C. 928.

[928] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

CHUNDI DUTT JHA (*Defendant*) *v.* PUDMANUND SINGH BAHADUR AND OTHERS (*Plaintiffs*).* [14th May, 1895.]

Appeal to Privy Council—Application for leave to Appeal—Civil Procedure Code (Act XIV of 1882*)*, s. 595*—Letters Patent of the High Court*, ss. 39, 40*—Order refusing the appointment of a Receiver in a suit.*

There is no appeal to Her Majesty in Council against an order refusing the appointment of a Receiver in a suit. Such order does not finally decide any

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* Application for leave to appeal to H.M. in Council No. 6 of 1895.

(1) 16 A. 43. (2) 7 B. 213.

matter which is directly at issue in the cause in respect to the right of the parties, and is not "final" within the meaning of cls. (*a*) and (*b*) of s. 595 of the Civil Procedure Code and s. 39 of the Letters Patent; nor is the matter a special case falling within the terms of cl. (*c*) of s. 59 of the Code or s. 40 of the Letters Patent.

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Justice of the Peace for Calcutta v. *Oriental Gas Company* (1); *Lutf Ali Khan* v. *Asgur Reza* (2); *Kishen Pershad Panday* v. *Tiluckdari Lall* (3); and *Rahimbhoy Habibhoy* v. *Turner* (4), referred to.

[R., 13 C.L.J. 507=10 Ind. Cas. 439; 13 C.L.J. 681=10 Ind. Cas. 444; 1 O. C. 205 (209).]

THIS was an application for leave to appeal to Her Majesty in Council against the order of the High Court refusing to appoint a Receiver in a suit brought by the plaintiffs in the Court of the Subordinate Judge at Bhagalpur. The facts relating to the petition for appointment and the order of the High Court have been given in the report of the case in the High Court (5). The arguments and cases cited on both sides sufficiently appear in the judgment of the High Court.

Mr. *Hill* and Babu *Taraknath Palit*, for the petitioner.

Babu *Digambar Chatterjee* and Babu *Dwarknath Chakrabarty*, for the respondent.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

JUDGMENT.

This is an application for a certificate to appeal to the Privy Council against an order of a Division Bench of this Court [929] refusing the plaintiff in the suit the appointment of a Receiver in the terms required by him.

The application is opposed and we have had considerable argument addressed to us as to whether this is a proper matter in which a certificate can be granted within the terms of s. 596 of the Code of Civil Procedure, which embodies the provisions of ss. 39 and 40 of the Letters Patent, 1865.

In order to entitle a party to a certificate under cls. (*a*) and (*b*), s. 595 of the Code, or s. 39 of the Letters Patent, it is necessary, in a matter of this description, that the order passed shall be a final decree, which, under the definition given in s. 594 of the Code, may be a final judgment and order. It is contended by Mr. Hill, who appears for the petitioner, that the order of the Division Bench of this Court comes within the terms of cls. (*a*) and (*b*), s. 595, or, if it falls short of that, the petitioner is entitled to appeal under the terms of s. 40 of the Letters Patent, which are embodied in cl. (*c*) of s. 595. We have been referred to several cases in the reports bearing on this subject. The leading case in this Court is that of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1), in which, on the interpretation of s. 15 of the Letters Patent, the meaning of the expression "judgment" was determined. It was there declared that "judgment" means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them

(1) 8 B.L.R. 433.
(2) 17 C. 455.
(3) 18 C. 182.
(4) 15 B. 155=18 I. A. 6.
(5). 22 C. 459.

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being that a final judgment determines the whole cause or suit, and the preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." So also in the case of *Lutf Ali Khan* v. *Asgur Reza* (1) it was held that an order, which determines the rights of the parties, is alone appealable under s. 15 of the Letters Patent. And in the case of *Kishen Pershad Panday* v. *Tiluckdhari Lall* (2) it was held that it must be an order deciding finally any question at issue in the cause, or the rights of any of the parties.

[930] Mr. Hill, however, contends that his client, the plaintiff in the suit, has the right to require the appointment of a Receiver so as to prevent waste; and that the refusal to grant him that right falls within the terms of the law as expressed in those cases. We are of opinion that the right to be determined is a right as expressed in the case of *Kishen Pershad Panday* v. *Tiluckdhari Lall.* The order in question must be one deciding finally the question at issue in the cause or the rights of any one of the parties. The appointment of a Receiver was not a matter directly in issue in the cause in respect to the rights of the parties as raised in that suit. It was as it were auxiliary to the decision of the suit in order to prevent any waste on the part of the defendant which might affect the rights which were then under determination. At the highest, the order can only be regarded as interlocutory, as falling within the terms of s. 40 of the Letters Patent.

This matter has been recently considered by their Lordships of the Judicial Committee of the Privy Council in the case of *Rahimbhoy Habibhoy* v. *Turner* (3). It was there found that the proper test in order to determine the meaning of the words "final order or decree" is to be found in the determination of what was really the question before the Court when the decree or order was made. The report also shows that, in the course of the argument, Lord Macnaghten expressed the opinion that "final decree in s. 595 does not mean last decree, but the decree determining rights finally;" by which we understand his Lordship to mean rights raised by the suit itself.

In this view, therefore, we are of opinion that the order in question does not fall within the terms of s. 595, cls. (*a*) and (*b*) of the Code of Civil Procedure, or of s. 39 of the Letters Patent; nor is this matter a special case within the terms of cl. (*c*) of s. 595, or s. 40 of the Letters Patent. If, however, the order be regarded as an interlocutory order within the terms of s. 40 of the Letters Patent, we cannot consider this a proper matter to be specially dealt with in appeal to the Privy Council. If we consider the **[931]** character of the order issued, and the result which might arise if an appeal were entertained by their Lordships in Council against an order of this description, we are led to conclude that it was not the intention of the Legislature that such an order should be appealable. It has here been determined that the plaintiff is not entitled to a Receiver in the terms desired by him. If he should obtain permission to appeal to the Privy Council, the trial of the suit would nevertheless proceed independently of the course of that appeal. It may so happen that the result of the trial might be that the plaintiff is found by both Courts in this country to have no merits in his case, and it may also possibly happen that, by reason of the nature of the suit and the judgments passed by the Courts in this country, the plaintiff might be without the right of an appeal to Her Majesty in Council by reason of there being concurrent judgments on questions of fact. So

(1) 17 C. 455. (2) 18 C. 182. (3) 15 B. 155=18 I.A. 6.

that there would then be an appeal to Her Majesty in Council as regards the question of the appointment of a receiver when actually the suit itself is finally determined in this country against the plaintiff, and it would not be open to the plaintiff to appeal to the Privy Council on its merits. It seems to us that probably the Legislature had this in view when, in allowing an appeal against a refusal to appoint a Receiver under s. 588 of the Code of Civil Procedure, it simultaneously declared that the order passed in appeal shall be final.

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For these reasons the application for leave to appeal to Her Majesty in Council in this case is refused with costs.

S. C. C. *Application refused.*

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22 C. 931.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

TARA PROSAD ROY (*Decree-holder*) *v.* BHOBODEB ROY (*Judgment-debtor.*)* [31st July, 1895.]

Mortgage—Execution of decree—Simple mortgage—Decree nisi*—Order absolute—Transfer of Property Act* (*IV of* 1882), ss. 88, 89.

A decree on a simple mortgage directing the sale of mortgaged property on default of payment within a fixed period is substantially a decree *nisi* **[932]** or conditional decree under s. 88 of the Transfer of Property Act, and cannot be executed unless it is made absolute by an order under s. 89 of that Act. *Ram Lal* v. *Narain* (1) followed. *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra* (2) distinguished. *Poresh Nath Mojumdar* v. *Ram Jodu Mojumdar* (3) referred to.

[**F.**, 25 C. 133 (135); **Appr.**, 9 M.L.J. 349 (350); **Cited**, 2 O. C. 337 (339); **R.**, 23 B. 644 (650); 28 C. 73 (77); 29 C. 651 (653); 6 Bom. L R. 1043 (1049); 11 C.W.N. 156 (157); 5 O.C. 251 (253); 6 O.C. 114 (115); 8 O.C. 75 (76); **Disc.**, 25 M. 244 (**F.B.**); **D.**, 10 C.L.J. 91 (99); 2 S.L.R. 90.]

ONE Amarnath Roy, when living in commensality with his cousin Bhobodeb Roy, executed a bond mortgaging joint properties in order to pay off joint family debts. After Amarnath's death, the mortgagee brought a suit on the mortgage bond against Bhobodeb. The suit was referred to arbitration, and a decree was passed in conformity with the award of the arbitrators. The decree directed that the money due should be realized by sale of Amarnath's share in the mortgaged properties now inherited by Bhobodeb, and exempted Bhobodeb's own share from liability to sale. The decree went on in the following terms: "On default of payment of the decretal amount within four months, the mortgaged property will be sold, and if the amount falls short the amount (balance) will be realized from the properties left by Amarnath, deceased."

In execution of this decree a sale proclamation was issued putting up to sale an 8-annas share in the mortgaged property as Amarnath's share. Bhobodeb objected to the proceeding on the ground that the decree had

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* Appeal from Order No. 73 of 1895, against the order of A. F. Steinberg, Esq., Officiating Judge of Nuddia, dated the 5th of September 1894, reversing the order of Babu Bepin Behary Chatterjee, Munsif of Chuadange, dated the 24th of September 1895.

(1) 12 A. 539. (2) 18 C. 139. (3) 16 C. 246.

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not been made absolute, and that the extent of Amarnath's interest had been exaggerated. The Munsif overruled both the objections, but on appeal the learned District Judge allowed the first objection and set aside the entire proceedings in execution. He said :—

"The wording of the relevant sections of the Transfer of Property Act (ss. 67, 86 to 89) is by no means clear, and as a question of grammar, the necessity of a decree absolute for sale in the case of a simple mortgage is not clear. It seems to me that the following arguments make strongly in favour of the appellant's contention : (1) The general tenor of these sections which contemplate that the ordinary procedure should be by decree *nisi* and by decree absolute. (2) The danger of fraud and of hardship to the creditors which the suggested relaxation **[933]** would involve. As these provisions are taken from the practice of the Court of Chancery which habitually interfered to protect a suitor or debtor from the extreme legal consequences of his acts, as literally interpreted, this consideration has great weight in my mind. (3) All reported cases imply the complete procedure, and where any relaxation is allowed, it is in favour of the debtor, not of the creditor."

The decree-holder appealed to the High Court.

Babu *Sris Chandra Chaudhuri*, for the appellant.—The first Court was right in holding that, in a case on a simple mortgage bond, it is not necessary to apply for an order absolute. A decree for sale in such a case is very different from a decree for foreclosure, and the grant of a period of grace does not alter the decree into one for foreclosure. Dr. Ghose on Mortgage in India, p. 128.

The provision for an order absolute for sale in s. 89 of the Transfer of Property Act does not apply to a suit on a simple mortgage, but refers to a suit for foreclosure in which a decree for sale has been passed under the latter part of s. 88. At all events the law does not prescribe a *form* for a decree absolute for sale on simple mortgages as in foreclosure (section No. 129 of sch. 4, Civil Procedure Code). The decree in this case was passed by the arbitrators, and was not in the form prescribed by law for decrees for sale. Even if it was, the objection taken is unsubstantial. The formal defect was cured by the order issuing sale proclamation. *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra* (1). The cases referred to by the lower Court on the question of the necessity of an order absolute relate to suits for foreclosure or for sale under the latter part of s. 88.

Babu *Prosunno Chunder Roy*, for the respondent.—Section 89 of the Transfer of Property Act makes it imperative to obtain an order absolute for sale. *Ram Lal* v. *Narain* (2). The objection is not a technical one, for the judgment-debtor might obtain an extension of the period of grace at the hearing of the application for an order absolute. The principle laid down in *Poresh Nath Mojumdar* v. *Ram Jodu Mojumdar* (3) applies.

[934] Babu *Sris Chandra Chaudhuri*, in reply.—In the case decided by the Allahabad High Court the decree was a conditional decree of the prescribed form. The only element of a decree of that form existing in the present case is the period of grace fixed in the decree. The report of that case, moreover, does not give the nature of the mortgage or of the suit. The order which was not admitted in that case as equivalent to an order absolute also does not appear in the report.

(1) 18 C. 139 (142). (2) 12 A. 539. (3) 16 C. 246.

The judgment of the High Court (NORRIS and GORDON, JJ.) was as follows :— 1895 JULY 31.

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JUDGMENT.

This is an appeal from an order of the District Judge of Nuddia, reversing an order of the Munsif of that district. It appears that the appellant sued the respondent to enforce a mortgage security. The case was referred to arbitration, and a decree was passed declaring that the mortgagor's share was liable on the mortgage. Execution was taken out, and a proclamation of sale was issued. Thereupon the judgment-debtor objected that the property could not be sold, because the decree had not been made absolute. The Munsif was of opinion that in the case of a simple mortgage no decree absolute is necessary. On appeal, the District Judge held that a decree absolute is necessary, and accordingly he allowed the objection of judgment-debtor, and set aside the execution proceedings as premature. On second appeal by the decree-holder it is contended (1) that under the provisions of the Transfer of Property Act, a decree absolute is unnecessary in the case of a simple mortgage ; and (2) the objection taken is of a highly technical character, and ought not to be allowed.

We think the District Judge's view is correct. The decree has been read to us, and it appears to be substantially a decree under s. 88 of the Transfer of Property Act, that is to say, it is a conditional decree or decree *nisi*, and we think it is clear from the provisions of s. 89 of the Act that, until an order absolute for sale of the mortgaged property has been made, the judgment-debtor has a right to redeem. The objection taken by him to the execution of the decree is, therefore, in our opinion a substantial one, and not merely one of a technical character, as is argued by the learned pleader for the appellant.

[935] He relied on *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra* (1), but we think that it is not on all fours with the present case. On the other hand, there is a case, *Ram Lall* v. *Narain* (2), which is exactly in point; and is, we think, a clear authority for the view we take. In another case *Poresh Nath Mojumdar* v. *Ram Jodu Mojumdar* (3) it was held that in a foreclosure suit the mortgagor can redeem at any time until the order absolute is made under s. 87 of the Transfer of Property Act, and similarly we think that in a suit for sale the mortgagor can under s. 89 redeem at any time before an order absolute for sale has been made. The appeal fails and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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(1) 18 C. 139. (2) 12 A. 539. (3) 16 C. 246.

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CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr .Justice Beverley.

QUEEN-EMPRESS *v.* GASPER.* [11th September, 1894.]

Criminal Procedure Code (Act X of 1882), s. 386—*Distress Warrant—Claim by third party to the property distrained.*

A Magistrate, who has issued a distress warrant under s. 386 of the Criminal Procedure Code, is not required by law to try any claim which may be preferred to the ownership of the property distrained.

[F. Rat. Unr. Cr. Cas. 976; R., 4 Bom. L. R. 109 (114).]

THIS was a reference by the Chief Presidency Magistrate of Calcutta, under s. 43 of the Criminal Procedure Code.

The facts of the case and the point referred for the opinion of the High Court appear sufficiently from the following letter of reference :—

"Mr. D. M. Gasper having been sentenced to a fine of Rs. 600, under s. 293 of the Penal Code, warrants for the levy of the amount by distress and sale were issued on the 8th day of August 1894.

"Certain moveable property, found on the premises occupied by Mr. D. M. Gasper, was in execution of such warrant seized, and a date was duly fixed by me for the sale of such property. Prior to the date of sale, a claimant, Mr. T. A. Frangopolo, appeared to such property, and I thereupon fixed a day for hearing his claim. Objection was taken as to my jurisdiction to hear it.

[936] "There appears to be no section in ch. XXVIII of the Code of Criminal Procedure, directing or authorizing a Magistrate to hear or determine such a claim, but there is a Criminal Circular Order of the Calcutta High Court, No. 806, 22nd June 1864, to be found in the General Rules and Circular Orders of High Court, Appellate Side Criminal 1891, headed, 'Procedure for the levy of fines' which lays down that, if a claimant come forward (to the property distrained upon), then the ownership of the property distrained must be determined by the Magistrate and not by the Police.

"A similar rule has been laid down for the levy of fines in the Punjab, *viz.*, 'When an objector comes forward, he should be warned of the penalties contained in s. 207 of the Penal Code, against a fraudulent claim to property to prevent its seizure in satisfaction of fines, and the objection should then be enquired into and disposed of, either by admitting the claim or referring the objector to a civil action if his claim seems groundless.' See notes to s. 386, Criminal Procedure Code, Henderson's last Edition, page 261.

"This Circular Order of the Calcutta High Court, was, however, apparently framed under Act XXV of 1861, s.443 (although it specifically mentions the Act of 1882, s. 386), and s. 441 of Act XXV of 1861 enacts that the Act should not apply to the procedure of the Chief Commissioner of Police, the Police Magistrates or the Police of the towns of Calcutta, Bombay and Madras, except so far as the Act itself expressly provides, *viz.*,

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* Criminal Reference No. 2 of 1894, made by T. A. Pearson, Esq., Chief Presidency Magistrate, dated 3rd September 1894.

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in ss. 84, 87, 119 and 112 which appear to be the only sections referring to Presidency Police and Police Magistrates.

"If this Circular Order therefore under Act XXV of 1861 does not apply to Presidency Police Courts, then s. 2 of Act X of 1882, which applies the Circular Order to the Act of 1882, does so only with the limitations and restrictions imposed on it by the Act of 1861, when the rule was framed, that is to say, it is applicable only to the Mofussil Courts.

"I may also add that the executive work of the Presidency Police Courts is carried out by the Commissioner of Police, and not as in the Mofussil, by the Magistrate himself.

"A somewhat, although not entirely, analogous question has been decided by the High Courts of Bengal and Allahabad under ch. VI of the Criminal Procedure Code, heading C, Proclamation and Attachment, s. 88. It has, in such decisions, been held where property, moveable or immoveable, has been attached under s. 88 as the property of an absconder or proclaimed person, that as the Criminal Procedure Code makes no provision for any investigation by a Magistrate of the claims of third persons to property which has been attached, the proper remedy of such claimant is by civil suit following the property. Peacock, C.J., and Norman, J., adding:—"*We are not prepared to say that, when claimants have held back for six months, a Magistrate may not be perfectly justified in presuming that the property was not theirs, and leaving them to vindicate any right they might have in a* **[937]** *civil suit.* He may fairly say that he is not bound to try a question which is more properly one for the Civil Court." Seton Karr, J., however, dissented from this view, considering that the Magistrate should determine upon the claim, see *Queen* v. *Chumroo Roy* (1). That case has, however, been followed by *In re Chunder Bham Sing* (2), a case of the attachment of an absconder's property under the old Code, and also by the case of *Queen-Empress* v. *Sheodihal Rai* (3), a case under s. 88 of the Code of 1882.

"There appear, however, to be some matters of distinction between cases of claims to attached property, under s. 88, ch. VI of the Code, and cases of distraint under s. 386. In the first place the attachment under s. 88 may be made in several prescribed ways which are very similar to attachments by a Civil Court; and, secondly, the attached property can only be sold after a period of six months after such attachment (unless it is property liable to decay), and this provision is, of course, the reason for the observation of the learned Judges who decided the case of *Queen* v. *Chumroo Roy* (1) which observation I have underlined in quoting the case: whereas under s. 386 there is no such period of six months during which the property is to remain under distraint before sale, and the same inference cannot, therefore, be drawn against claimants, under s. 386 as was drawn against claimants coming in under s. 88.

"Further, s. 88 applies to both moveable and immoveable property, whereas s. 386 applies only to moveable property, and it might well be that, where immoveable property is concerned, the property could be followed, and the matter of the claim be best determined in a Civil Court.

"There is, however, still in both sections the difficulty that the Code itself does not provide any procedure for a Magistrate trying either of such claims, and unless the Circular of the High Court, dated the 22nd June 1894, applies to Police Courts in the Presidency towns, there appears to

(1) 7 W.R. Cr. 35. (2) 17 W.R. Cr. 10. (3) 6 A. 487.

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be no direct authority for the trial of a claim under s. 386 being investigated by a Magistrate. The reported cases all, as far as I am aware, deal with the question as arising under attachment of property of absconders only. As the question is of great importance to the public, whose property may be seized under distress warrants issued by the Presidency Police Courts, I solicit the opinion of the High Court as to whether a Presidency Magistrate is bound to hear and decide upon claims made to property attached under distress warrants issuing out of the Presidency Courts, or whether the person claiming the property seized is to be referred to the Civil Court for his remedy.

"The matter has been adjourned, and the sale of the property seized stayed pending the decision of the High Court."

The parties were not represented at the hearing of the reference.

[938] The opinion of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

OPINION.

It does not appear that the Code contains any provision for the trial of claims which may be preferred to property which is distrained under s. 386, and any orders which this Court might issue could only be by way of advice. We are of opinion that when the Magistrate had issued his warrant under that section in the form given in the schedule, he had done all that was required of him by the Code, and that he is nowhere required by law to try any claim that may be preferred to the ownership of the property distrained. We express no opinion as to how such claims can be determined.

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22 C. 938.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

RADHA PERSHAD SINGH (*Plaintiff No.* 1) *v.* BUDHU DASHAD AND ANOTHER (*Defendants*) AND ANOTHER (*Plaintiff No.* 2).*
[19th June, 1895.]

Service tenure—Jagir granted to Gorait *or village watchman—Resumption by Zemindar—Notice.*

A service tenure created for the performance of services, private or personal, to the zemindar may be resumed by the zemindar when the services are no longer required or when the grantee of the tenure refuses to perform the services. The distinction between a grant of an estate burdened with a certain service, and an office the performance of whose duties is remunerated by the use of certain lands, pointed out.

Sanniyasi v. *Salur Zemindar* (1); *Hurrogobind Raha* v. *Ramrutno Dey* (2); *Sreesh Chunder Rae* v. *Madhub Mochee* (3); *Nilmony Singh Deo* v. *Government* (4); *Unide Rajaha Roje Bammaravze Bahodur* v. *Pemmasamy Venkatadry Naidoo* (5); *Fortes* v. *Meer Mahomed Takee* (6); **[939]** *Lilanand Singh* v. *Munorunjun Singh* (7); and *Mohadevi* v. *Vikrama* (8) referred to.

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* Appeal from Appellate Decree No. 933 of 1893, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Shahabad, dated the 16th of February 1893, affirming the decree of Babu Srigopal Chatterjee, Munsif of Buxar, dated the 30th of January 1892.

(1) 7 M. 268. (2) 4 C. 67. (3) S.D.A. (1857) 1772.
(4) 18 W.R. 321. (5) 7 M.I.A. 128. (6) 13 M.I.A. 438 (464).
(7) 13 B.L.R. 124=I.A. Sup. Vol. 181. (8) 14 M. 365.

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In a suit for resumption of jagir lands granted by the zemindar to a *gorait* (village watchman), the lower Courts found that the grant was made in favor of the defendant's ancestor more than twelve years before suit, and descended from father to son who was allowed to retain possession without rendering services to the zemindar, and that the zemindar could not prove the terms of the grant. *Held*, that the facts found did not legitimately lead to the inference drawn therefrom that the tenure was of a permanent character; but that the defendants could not be ejected without notice.

[F., 2 C.L.J. 403; R., 34 C. 753=5 C.L.J. 583=12 C.W.N. 193; 23 M. 262 (267); 13 C.L.J. 109 (114)=15 C.W.N. 61=8 Ind. Cas. 823; 8 C.W.N. 904 (905); 7 Ind. Cas. 202=8 M.L.T. 258; 12 Ind. Cas. 487=10 M.L.T. 391=(1911) 2 M.W.N. 406; 37 M. 1=23 Ind. Cas. 300; D., 11 Ind. Cas. 695.]

PLAINTIFF No. 1 as zamindar sued for the recovery of possession of certain lands in his zemindari from one Budhu Dashad and one Tufani Dashad, son of Kangali Dashad. The plaint alleged that the lands were granted to Kangali for the performance of the services of a *gorait* (village watchman), and that on the death of Kangali, the defendants, having failed to perform the services, were discharged, and the land brought under *sir* possession and settled with plaintiff No. 2; but that the defendants succeeded in getting a declaration of possession in their favour from the Criminal Court and dispossessed plaintiff No. 2.

The defendant Budhu denied the allegation of a grant to Kangali and set up a grant from the Mahomedan Government to his ancestors.

The Court of first instance found that Budhu, and his father before him, had held the lands for more than thirty years; that while on the one hand plaintiff No. 1 could not show that either he or his predecessors ever exercised ownership over the lands, the defendant Budhu on the other hand failed to prove his alleged grant; and the Court held that plaintiff No. 1 had no right summarily to dismiss Budhu at his will.

The Subordinate Judge, on appeal, found that the service tenure was created for private works of the zemindars, and was not a public grant. He said: "The tenure being proved to have deen created in favour of the respondent's ancestor long upwards of twelve years ago and descended from father to son who was allowed to retain possession even without rendering **[940]** services to the appellant, I should, in the absence of satisfactory evidence as to the terms of such grant to the contrary, hold that it was of a permanent as well as hereditary character and cannot be resumed by the appellant at his will, particularly when the holder is capable and willing to render those services to him for which the land was originally given." The appeal was dismissed.

The plaintiff No. 1 preferred a second appeal to the High Court.

Babu *Hem Chundra Banerjee*, Babu *Raghunandan Prosad* and Babu *Jogendra Chandra Ghose*, for the appellant.

Mr. *C. Gregory* for the respondents.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

JUDGMENT.

This was a suit by the Maharajah of Doomraon for recovery of possession of certain lands. The lands form part of his zemindari, and the action was based upon the allegation that the lands had been granted to one Kangali Dashad, father and ancestor of the defendants, as a jagir in lieu of services as a *gorait*; that he died in the year 1294 (F.S.), and the defendants having failed to perform the service, their services were dispensed with in

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1296; that the lands were then settled with one Raja Koeri, the plaintiff No.2; that he raised crops thereupon, but was dispossessed by the defendants in July 1890 (1297). The suit was defended by the defendant No. 1, Budhu Dashad, upon the ground that the land had not been granted in lieu of service to Kangali, the father of defendant No. 2, but that since before the accession of the British Government, his ancestors and he had been holding the same as *gorait's* jagir under a *sanad* (not produced), granted by a Mahomedan Emperor; that no service had ever been rendered to the plaintiff, the Maharajah of Doomraon, or to his ancestor, in lieu of holding possession of the lands in question, though he had been performing certain quasi-public service; and that in fact the land did not belong to the Maharajah's zemindari. He also pleaded that the claim was barred by limitation.

As regards these two last pleas, it is sufficient to say that they were negatived by the Courts below; and no question has been raised before us with reference thereto.

[941] Both the Courts below have dismissed the suit. The lower appellate Court, with reference to the question of the incidents of the defendants' tenure, has found that it was not a "public grant," but a service tenure created in favour of the contending defendants' ancestor "long upwards of twelve years ago" for the performance of private work of the zemindar, but that he (the zemindar) did not avail of the contending defendants' services "of late," and yet the latter continued to be in possession; and that the tenure descended from father to son. Upon these facts the Subordinate Judge holds, and as he says "in the absence of satisfactory evidence as to the terms of the grant or contrary," that it was of a permanent and hereditary character and cannot be resumed by the zemindar at his will, more particularly when the tenure-holder is "capable and willing" to render services.

The distinction between a grant for services of a public nature, and one for services, private or personal, to the grantor, is well understood. In the former case the zemindar is not entitled to resume, while in the latter case he may do so, when the services are not required or when the grantee refuses to perform the services. [See *Sanniyasi* v. *Salur Zamindar* (1); *Hurrogobind Raha* v. *Ramrutno Dey* (2); *Sreesh Chunder Rae* v. *Madhub Mochee* (3); *Nilmoney Singh Deo* v. *Government* (4); *Unide Rajaha Raje Bammarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo* (5)]. A distinction also exists between the grant of an estate burdened with a certain service, and that of an office, the performance of whose duties is remunerated by the use of certain lands. In the former case it would seem that the zemindar is not ordinarily entitled to resume, even if the service is not required, if the grantee is willing and able to perform the services, while in the other case he may do so when the office is terminated. [See *Forbes* v. *Meer Mahomed Takee* (6); see also *Lilanand Singh* v. *Munorunjun Singh* (7)].

[942] The Subordinate Judge has found that the service tenure held by the defendant was created for the purpose of doing the private work of the zemindar, and that the grant was not for performance of any public service. And there is nothing to shew that the grant was a grant of an estate burdened with the performance of certain services.

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(1) 7 M. 268. (2) 4 C. 67. (3) S.D.A. (1857) 1772.
(4) 18 W. R. 321. (5) 7 M.I.A. 128. (6) 13 M.I.A. 438 (464).
(7) 13 B.L.R. 124 = I. A. Sup. Vol. 181.

The question then arises whether the circumstances relied upon by the Subordinate Judge justify the inference (for it is only an inference as we understand his judgment) that the grant was of a permanent character. It seems to us that neither the fact that the land has been allowed to devolve from father to son, nor the fact that the tenure was created very many years ago, nor the circumstance that of late the zemindar did not avail himself of the services but still allowed the defendant to hold on, or all these facts taken together, could legitimately lead to the inference that the grant, which was purely in lieu of personal services to be rendered to the zemindar, was of a permanent character, such that the zemindar is not entitled to resume, though the grantee may refuse to perform the services, or the services may be no longer required.

The service grant having been created by the zemindar for personal services to be rendered, he has, we think, a *prima facie* right to resume the grant when such services are dispensed with [see *Sanniyasi* v. *Salur Zemindar* (1) ; *Mahadevi* v. *Vikrama* (2).] The defendant has not produced his *sanad*, nor has he proved that the grant was a grant of an estate burdened with certain services, but he is content with relying upon the circumstances referred to in the judgment of the Subordinate Judge, which in our opinion do not justify the inference that the grant was of a permanent and heritable character.

But then it seems to us that the plaintiff is not entitled to resume the grant before he gives to the grantee notice dispensing with his services. The allegation in the plaint is that the defendants were discharged from the office of *gorait* ; but it would appear upon the evidence adduced by the plaintiff that the services of defendant No. 2 were dispensed with because he expressed his **[943]** inability to perform the services as *gorait*, and that the defendant No. 1, the real holder of the service tenure, had no notice of the determination of the service, or of the action on the part of the zemindar in settling the lands with plaintiff No. 2.

It seems to us, therefore, that the plaintiff cannot recover possession in this action, for he can only do so by determining the service tenure held by the defendant No. 1. Upon the judgments of the Courts below, and upon the case of the plaintiff himself, that tenure has not yet been determined; the plaintiff has not given to the contending defendant any notice to quit, nor is there any allegation, much less evidence on his part, that the defendant has declined to perform the services for which the tenure was created; though no doubt the defendant by his written statement has clearly indicated that he is not willing to render any services to the plaintiff. In this view of the matter, we are of opinion that the claim for ejectment fails. We, however, think that, as the question of the character of the tenure held by the defendant No. 1 was raised in issue between the parties and dealt with by the Courts below, it may be declared, as has already been expressed, that the tenure in question is a service tenure created in lieu of private services to be rendered to the zemindar, and that the tenure is not of a permanent character.

Each party will bear his own costs throughout this litigation.

S. C. C. *Appeals dismissed.*

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(1) 7 M. 268. (2) 14 M. 365.

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22 C. 943.

22 C. 943.

ORIGINAL CIVIL.

Before Mr. Justice Hill.

M. M. WATKINS AND OTHERS *v.* N. FOX AND OTHERS.*
[20th May, 1895.]

Limitation Act (*XV of* 1877), *art.* 84—*Taxed costs of an attorney, Suit for—Suit or particular business, Meaning of.*

Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application itself.

Where a firm of attorneys brought a suit against their clients to recover the costs of an application to the High Court:

Held, that limitation began to run from the date of the judgment in the [944] application. *Balkrishna Pandurang* v. *Govind Shivaji* (1) and *Rothery* v. *Munnings* (2), approved.

Items of an attorney's bill for work done, subsequently to the judgment, in opposing the taxation of the opponent's costs, although done on his client's instructions, will not take the matter out of the Limitation Act. Such items do not form part of the costs of the original application.

[R., 36 B. 360 (365) = 14 Bom.L.R. 325 = 15 Ind. Cas. 512 ; 17 C.P.L.R. 178 (190).]

THIS suit was brought by the widow and sole executrix of the will of Mr. Algernon Watkins, and the other partners in the firm of Messrs. Watkins and Co., attorneys of the High Court of Calcutta, to recover the sum of Rs. 6,186-9-10, the balance of an account due to them from defendants as their costs in certain proceedings in which they acted as the attorneys of the defendants. The costs were incurred in connection with an application by the defendants under Act XV of 1859, s. 24, to the High Court for an order, declaring that a certain patent in a sugarcane crushing machine owned by Messrs. Thomson and Mylne was null and void, and that Messrs. Thomson and Mylne had acquired no exclusive privileges in respect thereof. The plaintiff's firm first received instructions to act for the defendants in January 1887, and the petition was presented on 26th of May 1887.

The order was made by the High Court on the 30th January 1888, dismissing the application with costs.

The plaint was filed on 7th April 1891.

The defendants, in their written statement, now raised the defence that the suit was barred by limitation under art. 84 of the Second Schedule of the Limitation Act, but they did not appear at the trial.

Subsequently to the order dismissing the application, Messrs. Watkins and Co. continued to act as attorneys for the petitioners (the defendants in this suit), opposing on their behalf various applications for the taxing of their costs made from time to time by Messrs. Sanderson & Co., who were the attorneys for Messrs. Thomson and Mylne in the original application.

Mr. *Garth* and Mr. *Dunne*, for the plaintiffs.

Mr. *Dunne.*—The present suit to recover our costs is not barred by art. 84 of the Limitation Act. The bill of costs shews that

* Suit No. 195 of 1891.

(1) 7 B. 518.

(2) 1 B. & Ad. 5.

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[945] instructions were given by the defendants to their attorneys to delay as much as possible the taxing of the costs of the other side. This they did, and the doing so would bring them within the period of three years required by the section of the Limitation Act. The opposing of the taxing of the costs of the other side was done on instructions received from the defendants (our clients), and was, if not part of the suit, at any rate part of the particular business in which they acted as attorneys. This would bring the matter down to September 1888, the last item in the bill of costs being "attending the taxation of the costs of the other side" on the 7th September 1888. The attorneys, acting for a party in a suit, cannot refuse to go on with the taxation of the other side's costs, It is part of the regular business connected with the suit, and contemplated by s. 84 of the Limitation Act. *Narayana Chetti* v. *Champion* (1), *Balkrishna Pandurang* v. *Govind Shivaji* (2), *Harris* v. *Quine* (3). The warrant of attorney continues, until all proceedings in the suit are ended, so far as regards the client ; s. 39 of the Civil Procedure Code.

The proceedings in this application are on the same footing, although it is an application and not a suit. There has been no discontinuance by the attorneys of the business they were conducting for the defendant, nor has that business terminated. Belchambers' Rules and Orders, s. 94 ; *Hearn* v. *Bapu Saju Naikin* (4).

[HILL, J.—It is significant that the Act does not use the words "judgment or decree."] Yes, and it does not define when the suit is determined, nor am I aware of any definition of what is a suit. The business cannot have terminated until the costs of the other side were taxed, and the liability of the present defendants, the plaintiff's clients, reduced to a certainty.

JUDGMENT.

HILL, J.—This is a suit by a firm of solicitors carrying on business under the style of Watkins and Co., and the legal representative of Mr. Algernon F.N. Watkins, a deceased member of the firm, for the recovery of the costs of certain proceedings in [946] this Court, under s. 24 of Act XV of 1859. The object of those proceedings was to effect the revocation of a patent held by two persons, named Thomson and Mylne, for a sugar-crushing machine.

The plaintiffs' case is that the first defendant, Mr. Neil Fox, consulted their firm so far back as the year 1885, with respect to the revocation of Messrs. Thomson and Mylne's patent, representing that he did so, not only on his own behalf, but also on behalf of other persons, who were interested in getting the patent set aside, and that in pursuance of his instructions the proceeding mentioned above was instituted on the 26th May 1887. In consequence, however, of the circumstance that Mr. Neil Fox was himself a licensee under the patent it was considered unadvisable that he should be made a party to the proceeding, and it was arranged accordingly that the name of the third defendant, Mr. Moses, should be used instead of his. This was done. The warrant of attorney authorizing Watkins and Co. to act was signed by Mr. Moses, and the proceeding was conducted in his name, and, as is alleged, on his account, as well as on that of Mr. Neil Fox.

(1) 7 M. 1. (2) 7 B. 518. (3) L.R. 4 Q.B. 658. (4) 1 B. 505.

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The second defendant, Mr. George Fox, a brother of the first defendant, it is said, was one of the persons interested in the revocation of the patent, on whose behalf Mr. Neil Fox had instructed Messrs. Watkins and Co., and on that ground, as well as upon a personal undertaking given by him after the proceeding under the Patent Act had ended, guaranteeing the payment of the costs, he has been included in this suit. With respect to this undertaking, the plaintiff's case is that on the 9th March 1888, the application under the Act of 1859 having been dismissed with costs on the 20th January 1888, Mr. George Fox had an interview with Mr. Algernon F. N. Watkins, at which he promised that, if time was given to his brother for the payment of the costs, he would see that they were paid, and he promised also that he would himself remit at once to Messrs. Watkins and Co. a sum of Rs. 2,000 then due for Counsel's fees. At the same interview he further instructed Messrs. Watkins and Co. to delay the taxation of the respondents' costs as much as possible. Mr. George Fox, it is said, having given these [947] undertakings and instructions to Mr. Watkins, was referred by the latter to Mr. Farr, at that time a member of the firm of Messrs. Watkins and Co., and in charge of the particular case, to whom they were repeated and who accepted them. Time was, it is stated, accordingly given to Mr. Neil Fox, but nothing has since been paid by any of the defendants. Mr. Neil Fox has not entered an appearance to this action. Mr. Moses has entered an appearance, but has not filed a written statement. Mr. George Fox has filed a written statement, but no one appeared at the hearing, either on his behalf or on that of his co-defendants.

By his written statement Mr. George Fox denies all personal interest in the proceeding under the Patent Act. He denies also having given any undertaking to pay his brother's costs, and he pleads that the suit is barred by limitation.

To deal in the first place with the case of the first defendant. As against him the suit is based (excepting two trifling items) upon a bill of costs taxed by the taxing officer of this Court, and there is no reason for supposing that any of the charges which it contains are unreasonable. Mr. Farr, who was at the time a member of the firm of Messrs. Watkins and Co., though he has since then severed his connection with it, deposes to their correctness, and Mr. Neil Fox has himself, in certain letters which he wrote to the plaintiff's firm in relation to their claim, admitted his liability. So that, unless the suit is barred by limitation, there can be no question but that he ought to pay.

With respect to that question, the following particulars are material: The present suit was instituted on the 7th April 1891, judgment was delivered in the proceeding under the Patent Act on the 20th January 1888. On the 20th February 1888 the latest Act in relation to the preparation of the orders of the Court in that proceeding seems to have been performed by Messrs. Watkins and Co. On the 9th March 1888 Mr. George Fox's interview with Mr. Watkins took place, at which he is said to have given the undertaking on which it is now sought to make him liable, and instructed Messrs. Watkins and Co. to do what they could to delay the taxation of the costs of his brother's opponent.

In pursuance of these instructions Messrs. Watkins and Co. [948] did attend the taxation for the purpose mentioned, and succeeded apparently in prolonging the taxation considerably. The last item in their bill of costs for services so rendered is dated the 17th September 1888.

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The question is whether the period of limitation by which this suit is governed began to run from the date of judgment in the Patent Act proceeding, or from the date upon which Messrs. Watkins and Co. performed their latest act of service in relation to the taxation of the respondent's costs.

The question is governed by art. 84 of the 2nd Schedule of the Limitation Act, and if the former date be the proper one, the suit is, so far as Mr. Neil Fox is concerned, barred; if the latter, it is within time.

The material part of the article in question provides that a suit by an attorney for his costs of a suit or a particular business must be brought within three years from the date of the termination of the suit or business. The first point for determination then is under which category, that of "a suit" or of "a particular business," the proceeding now in question falls.

I am not aware that the first of these terms has been defined by the Legislature, although it is no doubt provided by the third section of the Limitation Act, that in that Act (unless there be something repugnant in the subject or context) "suit" does not include an appeal or an application, but this distinction must, I think, be confined in its effect to the immediate purposes of the Act, and has no bearing upon the point now under consideration.

The separation of suits in the article from business of other kinds might seem at first sight to suggest that it was intended to draw some general distinction between litigious and non-litigious business. But numerous examples of litigious business might be mentioned, to which it would, without an obvious misapplication of language, be improper to apply the word "suit," and I think that the term ought to be confined to such proceedings as under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Acts which regulate them are treated as suits.

[949] It is unnecessary now, if the term be employed in that sense, to attempt further to determine its scope. But it seems to me that so used it does not include a proceeding under s. 24 of the Act of 1859. There are differences with respect to the mode of institution, the procedure for conducting them and their ultimate result, which create a substantial distinction, I think, between such a proceeding and a suit in the above acceptation. The Act of 1859 itself, moreover, maintains throughout the distinction between the action for infringement for which it provides and the "proceeding" under s. 24. I think, then, that a proceeding under that section falls under the second category of art. 84, and that what has to be determined in the present case is, when the business for which Mr. Neil Fox retained the plaintiffs' firm when he engaged them to conduct this proceeding terminated.

The distinction does not, however, in this instance appear to me to affect the result very materially; for I think that the analogy of an ordinary suit ought to apply.

There are, apparently, two cases in the Indian Law Reports, in which it has been decided when a suit terminates for the purposes of the Limitation Act, and they unfortunately do not agree. One of these is *Narayana Chetti* v. *Champion* (1) and the other is *Balkrishna Pandurang* v. *Govind Shivaji* (2). In the former it was ruled that, until costs are taxed and

(1) 7 M. 1. (2) 7 B. 518.

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inserted in the decree and the decree has issued, a suit has not terminated within the meaning of art. 84 of the Limitation Act. In the latter it was held, following what was said in *Harris* v. *Quine* (1), that a suit terminates with the judgment of the Court in which it is commenced. Whether the learned Judges who decided these cases had s. 39 of the Code of Civil Procedure before their minds does not appear from anything said in their judgments. But I must, I think, assume that they had, and the cases seem therefore to show that, although there may be proceedings in the suit subsequent to the judgment or decree, and the suit may therefore still, in that sense, subsist (for that, I take it, may be inferred from s. 39), the point at which for the purposes of **[950]** the Limitation Act the suit is to be taken to terminate is the issue of the decree (according to the Madras Court), or the giving of judgment (according to the Bombay Court). By "judgment" in the decision of the latter Court I presume is meant the judgment of the Court in the sense in which the term is used in the Code of Civil Procedure. But whether the issue of the decree or the giving of judgment be the proper starting point for the running of the period of limitation, would not make any practical difference in the present instance, for neither of these things (taking the order of the Court to be equivalent to a decree) appears to have taken place within three years before the institution of this suit. It was not, indeed, contended that they had done so, but the learned Counsel for the plaintiffs argued that the later items of their bill attached to the earlier, and in this way brought the whole of the claim within the period of limitation.

The later items are concerned only, however, with the taxation of the costs of Mr. Neil Fox's opponent. In support of his contention Mr. Dunne relied upon the Madras case cited above for the purpose of showing that, while the taxation of costs was proceeding, the suit could not be said to have ended But while I doubt with much deference whether the rule laid down in that case can be supported on principle, I think at all events that it is inapplicable to the practice prevailing on the Original Side of this Court and that I ought rather to follow the rule laid down in Bombay.

The present case, indeed, seems to me to be very like that of *Rothery* v. *Munnings* (2), the effect of which is thus stated in "Darby and Bosanquet's Statutes of Limitation" at p. 39: "But when judgment has been given, and there is no appeal, the Statute begins to run, and subsequent items within the six years incidental to the business of the action will not take the earlier items in the bill out of the Statute." In that case the subsequent item was in respect of the taxation of an opponent's costs. So that I do not think that the plaintiffs here can successfully rely on the later items of their bill as an answer to the Statute.

Having arrived at this conclusion I thought it desirable under all the circumstances of the case to suspend my judgment **[951]** in order to enable the plaintiffs, if they thought fit, to amend their plaint by claiming exemption from the operation of the Statute on the ground of acknowledgments of his liability made by Mr. Neil Fox in certain letters, which were before me for another purpose. I refer to his letters to the plaintiffs' firm of the 12th May and 1st June 1889. These letters contain clear

(1) L.R. 4 Q.B. 653. (2) 1 B. & Ad. 5.

admissions of liability for the costs, not only of the proceeding, but of the work subsequently done by Messrs. Watkins and Co., and bring the suit as a whole within the statutable period. The plaint has since been amended accordingly, and I think, therefore, that there ought to be a decree with costs on the usual scale as against the first defendant for the full amount claimed. I should, perhaps, add that, although the amendment referred to was made in deference to my opinion, the learned Counsel for the plaintiffs did not desire to give up his contention that the suit was otherwise within time.

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Next as to the defendant Mr. Moses, I cannot say that I am satisfied as to his liability when the manner in which he was brought upon the scene is considered. The mere statement of Mr. Neil Fox that Mr. Moses was a person who was interested in the revocation of the patent, and on whose behalf he consulted the plaintiffs' firm, is not in my opinion sufficient to charge him. The application under the Patent Act was, I understand, dismissed on the ground that it was in reality the application of Mr. Neil Fox, a licensee, and not that of Mr. Moses, and Mr. Moses has all along apparently repudiated any "moral liability" for these costs, by which I understand him to mean that they were not incurred for him. I can find no evidence that the proceeding was conducted with reference to him or in his interests, and I think that, as in reality he was not a party to the proceeding, but only so in name, it was never intended by him or them that he should incur any liability to Messrs. Watkins and Co. as a consequence of the employment of his name. I think, therefore, that, as against Mr. Moses, the suit ought to be dismissed.

Then with regard to Mr. George Fox, I do not think that the statement that he was concerned in the retainer of Messrs. Watkins & Co. has been established by evidence. His first introduction to them seems to have been on the 9th March 1888, when he came to them to ask time for his brother, and to offer [952] them his guarantee, and he certainly does not seem to have been treated by them then as a principal. But in respect of his guarantee, although he now denies it in his written statement, I can see no reason to doubt Mr. Farr's evidence. All that there is to oppose to it is the denial contained in the written statement and the somewhat tardy repudiation of "any express promise" in his letter to Messrs. Watkins and Co. of the 26th May 1889. On the other hand, Messrs. Watkins and Co., from the earliest stage of their correspondence relative to their claim, asserted this undertaking, and for a period of some six months after Mr. George Fox's interview of the 8th March no application whatever appears to have been made to his brother by Messrs. Watkins & Co. for payment, although their out of pocket costs amounted to a very substantial sum.

What I understand Mr. George Fox to have guaranteed was the payment by his brother of the costs, not only of the proceeding, but also such costs as might be incurred in retarding the taxation of the costs of the other side in the proceeding, and his undertaking was to pay those costs in the event of his brother failing to pay them after Messrs. Watkins and Co. had given him time, that is, as I take it, reasonable time for payment. Messrs. Watkins and Co. did in my opinion give him a reasonable time, their first demand after the 8th March having been made at the end of August following; and it was then, I think, on his brother's failure to pay, that the liability of Mr. George Fox arose. His plea of the Statute of Limitation, therefore, seems to me to fail, and the suit ought in my

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opinion, as against him as well as against his brother, to be decreed in full with costs on the usual scale (1).

Attorney for the plaintiff: Babu *Lallit Madhub Mullick.*

C. E. G.

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22 C. 952-N.

(1) ADMINISTRATOR-GENERAL OF BENGAL *v.* CHUNDER CANT MOOKERJEE.* [21st December, 1893.]

This was a suit brought by the Administrator-General of Bengal as executor of the will of Charles Delmar Linton, deceased, Attorney of the High Court of Calcutta, to recover the sum of Rs. 5,178-8-0, alleged to be owing by the defendant for costs for work done by the attorney in connection [953] with certain suits, from April 1881 to July 1888. The bill of costs was taxed on the 10th December 1891 and passed on the 2nd May 1892.

In the plaint, the plaintiff admitted that certain payments had been made towards the amount, and that the last payment was made on 13th June 1891.

The defendant in his written statement pleaded that the suit was barred by the Limitation Act, and denied that any payments had been made on the 15th June 1891, or on any other day, but stated that he had already paid the attorney Rs. 19,371 by way of costs, and that there were no further sums due to him. He also stated that the 6th December 1887 was the last date on which any work was done for him by the deceased as his attorney, and that that was the date on which the last suit came to an end. In the course of the hearing, the following letter was put in on behalf of the plaintiff, written by Babu Prannath Pal, on behalf of Chunder Cant Mookerjee to the Administrator-General of Bengal :—

"As my client the defendant Babu Chunder Cant Mookerjee is, I am informed, seriously ill, and it is impossible to get from him instructions now to proceed with the taxation of the bill of costs in the above, I beg to request the favour of your kindly granting my client six weeks' time, within which either to settle the matter of the said bill of costs, or if that cannot be done, to proceed with the taxation of the said bill of costs of the said attorney, Mr. C. D. Linton, deceased. I herewith remit the sum of Rs. (72) seventy-two, which you had to pay as fee for taxing the said bill. I beg in conclusion that you will kindly direct your clerk, who has charge of this business, to consent to my application for postponement of the taxation for six weeks."

The present suit was instituted on the 12th August 1892.

JUDGMENT.

TREVELYAN, J.—The only question in this case is whether the suit is barred by the law of limitation.

The suit is brought on an attorney's bill of costs. The last work done by the attorney for the client was admittedly more than three years before suit. The bill is in respect of a suit brought against the client. The attorney acted in the appeal which concluded the suit. The last work he did was making a copy of the taxing summons, which was taken out by the other side and sending it to his client. There was nothing more to be done in the suit, except that the other side, which had obtained a decree for costs, was entitled to execute such decree. It was contended that, for the purpose of the Limitation Act, the suit had not terminated as the attorney might have to appear in the execution proceedings. This contention, if correct, would postpone the attorney's remedy for twelve years.

In my opinion a suit can ordinarily be said to have terminated, when there is nothing more to be done in it, except execution.

It was also contended that the plaintiff was entitled to a fresh period of [954] limitation on the ground of (1) a part payment, (2) an acknowledgment of liability.

The so-called part payment was clearly made to pay off a sum which was paid by the Administrator General after Mr. Linton's death. It was not a part payment of the bill.

What is suggested to have amounted to an acknowledgment of liability is to be found in a letter written by the defendant's attorney. It is as follows: (reads letter 22 C. 953). It is remarkable that the framer of the plaint did not put this letter forward as taking the case out of the Act.

The plaintiff relied upon several English cases, the last being a decision by Mr. Justice North in *Curwen* v. *Milburn* (1).

* Suit No. 502 of 1892.

(1) L.R. 42 Ch. D. 424.

This case went to the Court of Appeal, but was there decided on other grounds. The cases cited all depend upon the terms of the several letters. If the present letter can be construed as an acknowledgment of liability the plaintiff is entitled to recover. I think that it does not bear such a construction. 1895 MAY, 20.

The letter shows, on the face of it, that the attorney had no instructions at all. He asks for a postponement, and adds that, during the time either the matter would be settled or the case would go on. There is no promise of any kind to settle the bill in the sense of paying a portion of it. ORIGINAL CIVIL. 22 C. 943.

If one attorney were to write to the attorney of the opposite side in a suit which was coming for trial, asking him to consent to a postponement in order that the parties might settle the suit, and if they would not settle, the case would go on. Could this in any sense be treated as an acknowledgment of liability to pay the whole or any portion of the amount claimed in the suit? I think not. In the present case the attorney is not doing anything more. I think that the suit must be dismissed.

22 C. 954.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

MAHOMED AKRAM SHAHA AND OTHERS (*Plaintiffs*) v. ANARBI CHOWDHRANI AND ANOTHER (*Defendants*).* [16th August, 1895.]

Limitation Act (XV of 1877), sch. II, art. 127 – Joint family property—Suit by Mahomedan for possession of share by inheritance.

Article 127 of sch. II of the Limitation Act (XV of 1877) does not apply to a suit by Mahomedans for possession by right of inheritance of shares in the property of their deceased ancestor.

[F., 5 N.L.R. 41 = 2 Ind. Cas. 15; Appr., 7 C.W.N. 155 (157); R., 22 Ind. Cas. 195 (224) = 15 Bom.L.R. 1099.]

[955] THE plaintiffs brought this suit in the Court of the Subordinate Judge of Dinajpur, for recovery of possession of 5 ans. 16 gundas 2 karas and 2 krants share of certain properties, moveable and immoveable, on the allegation that they were the properties left by one Panchu Shaha, and that the plaintiffs having been in possession of them jointly with the defendants were dispossessed by the latter in Falgun 1293 B. S. (February 1887). It was admitted on both sides that Panchu Shaha died in the year 1264 B. S. (1857), leaving him surviving a widow, the defendant No. 1, and two daughters, Zinnatunnessa and Izatunnessa. The plaintiff No. 1, Mahomed Akram, was the husband of Izatunnessa, who died in 1287, leaving two sons, plaintiffs Nos. 2 and 3, and one daughter, plaintiff No. 4.

The plaintiffs alleged that after the death of Panchu Shaha, his widow and two daughters were in joint possession of the properties left by him, and that after the death of Izatunnessa, the plaintiffs, as her legal heirs, were also in possession of the properties jointly with the defendants to the extent of the share claimed by them, until they were dispossessed from the same by the defendants. The main defence was the plea of limitation, the defendant No. 1, Anarbi Bibi, being alleged to have been in exclusive possession of the properties since the death of Panchu Shaha, which took place in 1264 (1857). The Subordinate Judge gave the plaintiffs a decree for the immoveable properties claimed. He held that even if art. 127 of the Limitation Act, did not apply, there could be no question

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* Appeal from Appellate Decree No. 1521 of 1894, against the decree of S.N. Hudda, Esq., District Judge of Dinajpur, dated the 25th June 1894, reversing the decree of Babu Kally Prosunna Mukerjee, Subordinate Judge of Dinajpur, dated the 5th of February 1894.

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of the applicability of art. 144, and therefore limitation could not commence to run against the plaintiffs, until the defendants' possession became adverse to them, and that prior to 1293 (1887) there was not even the semblance of an adverse possession on the part of defendant No. 1 as against the plaintiffs. Accordingly he overruled the plea of limitation. On appeal the District Judge reversed the decree of the Subordinate Judge and dismissed the suit. The plaintiffs brought this appeal to the High Court.

Mr. *C. P. Hill*, Babu *Sreenath Das*, Babu *Gobind Chunder Das*, and Moulvie *Mohamed Mustafa Khan*, for the appellants.

Mr. *L. P. Pugh* and Babu *Jasoda Nundun Pramanik*, for the respondents.

[956] Mr. *Hill.*—With regard to the plea of limitation it is contended by the defendants that since the death of Panchu the defendant Anarbi was alone in possession of the properties left by him, and that her daughters were never in possession of them. The plaintiffs allege that the daughters participated in the profits of the properties and lived with their mother. They all lived jointly, and the property inherited from Panchu was joint family property, and is governed by art. 127 of sch. II of the Limitation Act. Anarbi was manager and trustee for her minor daughters, and therefore her possession could not be an antagonistic to them. I admit that there is no such thing as a joint family in the Hindu sense among Mahomedans, but there is such a thing as joint property. The proper inference where Mahomedans live and mess together is that those who are getting their expenses paid out of the property are in possession of their shares. It was held in *Khyroonissa* v. *Salehoonissa Khatoon* (1) that cl. 13, s. 1 of Act XIV of 1859 applies to Mahomedans as well as to Hindus. The judgment says: "The words used in the clause are 'joint family property' and 'property alleged to be joint,' which are the usual terms with reference to joint Hindu families. But we see no exception as to Mahomedan families, or why their respective rights by inheritance should not come under limitations prescribed generally against parties not trustees as well as trustees." The decision in *Bavasha* v. *Masumsha* (2) is an authority for the proposition that joint family property includes property left by a deceased Mahomedan and divisible among his heirs, until it is divided, and that art. 127 of the Limitation Act applies to a suit for a division of such property. That case was followed in *Abdul Rahim* v. *Kirparam Daji* (3). Article 127 therefore applies to Mahomedans as well as to Hindus. *Moonshee Sirdar* v. *Molungo Sirdar*(4) decides that even if a member of a Mahomedan family collects the rents and profits of the family property, his possession cannot be considered adverse to his mother and sister so long as these live and mess jointly with him and receive money's worth in the payment of their family's expenses. See also *Chunder Monee Debia* v. *Meharjan Bibee* (5).

[957] The Full Bench case of *Amme Raham* v. *Zia Ahmed* (6), and the case of *Patcha* v. *Mohidin* (7) are against my contention. The Madras and Allahabad Courts have taken one view and the Bombay Court another.

Mr. *Pugh*, for the respondents.—These objections in law do not arise. The Judge in the lower appellate Court finds that Anarbi alone had been in possession of the properties in dispute. This is a finding of

(1) 5 W.R. 238. (2) 14 B. 70. (3) 16 B. 186. (4) 24 W.R. 1.
(5) 22 W.R. 185. (6) 13 A. 282. (7) 15 M. 57.

fact. Her possession was hostile to her daughters. Unless art. 127 of the Limitation Act applies the suit would be barred. It has not been alleged that there is any special family custom by which the rules of Hindu law as to joint family property would apply. The judgment in *Patcha* v. *Mohidin* (1) says: "It seems to us impossible that property which was in no respect joint family property in the Hindu sense up to the date of the deceased's death, should become joint property in the Hindu sense because of his death, and we cannot but think the words 'joint family property' in art. 127 were intended to refer to joint family property in the Hindu sense of the term." It was held in *Amme Raham* v. *Zia Ahmad* (2) that the words "joint family property" in art. 127 mean "the property of a joint family." See also *Raghunath Bali* v. *Maharaj Bali* (3).

Mr. *Hill* in reply.

JUDGMENT.

The judgment of the Court (NORRIS and GORDON, JJ.) was delivered by

GORDON, J.—The subject-matter of this suit is a share of certain properties which belonged to one Panchu Shaha. Panchu died in 1264, leaving him surviving a widow, Bibi Anarbi, and two minor daughters, Zinnatunnessa and Izatunnessa. Izatunnessa married Akram Shaha, who is plaintiff No. 1 in this suit. She died in 1287 leaving two minor sons and a minor daughter, who are plaintiffs Nos. 2, 3 and 4. The plaintiffs allege that on the death of Panchu his widow and two daughters inherited his properties and were in joint possession and enjoyment of the same; that on the death of Izatunessa, whose share was 7 annas, **[958]** the plaintiffs inherited a share of 5 ans. 6 gundas 2 karas and 2 krants, and were in joint possession of it with the defendants Bibi Anarbi and Zinnatunnessa up to 1293, when they were dispossessed. They accordingly sue to recover possession of their share. The defence is that on the death of Panchu Shaha his widow Anarbi took possession of all his properties, and has been ever since in sole and exclusive possession of them as proprietor, and hence that the suit is barred by limitation. The Subordinate Judge gave the plaintiffs a decree for the immoveable properties claimed. He held that the plaintiffs were not excluded from or out of possession of these properties prior to 1293, and therefore whether arts. 127, 142 or 144 of sch. II of the Limitation Act applied, the suit in any case could not be barred. On appeal the District Judge reversed the Subordinate Judge's decree and dismissed the suit. He found that neither Izatunnessa, nor the plaintiffs, were ever in possession of the properties claimed; that on Panchu's death Anarbi alone entered into possession and continued in exclusive possession as proprietor; that such possession has all along been adverse and hostile to the plaintiffs, and that, therefore, the suit is barred by limitation. He further held that under Mahomedan law, on the death of Panchu, Izatunnessa and the defendants did not constitute a joint family, and the property they inherited was not joint family property in the sense in which these terms are understood in the Hindu system of jurisprudence.

In second appeal Mr. Hill contended that the decision of the learned District Judge is based on an erroneous view of the Law of Limitation as

(1) 15 M. 57. (2) 13 A. 282. (3) 11 C. 777.

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applicable to the facts of the case. He argued that, inasmuch as it is proved that after the death of Panchu, his daughters Zinnatunnessa and Izatunnessa lived with, and were supported by, their mother, they all formed a joint family, and that the property they inherited from Panchu was joint family property within the meaning of art. 127 of the second schedule of the Limitation Act of 1877; that the possession by Anarbi was possession by her as manager or trustee on behalf of her minor daughters, and that such possession could not be hostile or antagonistic to them as the District Judge has found. Mr. Hill admitted that if art. 142 or art. 144 of the Limitation Act [959] applies, then the suit is barred, and therefore the only question we have to determine is whether art. 127 applies to the present case. Mr. Hill in the course of his argument referred to the following authorities: *Khyroonissa* v. *Salehoonissa Khatoon* (1), *Achina Bebee* v. *Ajeejoonnissa Bibee* (2), *Bavasha* v. *Masumsha* (3), *Amme Raham* v. *Zia Ahmad* (4), *Patcha* v. *Mohidin* (5), *Chunder Mone Debia* v. *Meharjan Bibee* (6), and *Moonshee Sirdar* v. *Molungo Sirdar* (7). There is, as far as we are aware, no decision of this Court under art. 127 which touches the question now raised, that is to say, whether the words "joint family property" in that article apply to the property of Mahomedans strictly governed by the principles of Mahomedan law. The case of *Khyroonissa* v. *Salehoonissa Khatoon* (1) was decided with reference to cl. 13, s. 1 of Act XIV of 1859, and it was held that the words "joint family property" in that clause applied to Mahomedan as well as to Hindu families. But it does not appear whether the Mahomedan family in this case was or was not governed by any special custom, under which the rules of Hindu law as to joint family property would apply, and therefore we think that this decision is not conclusive on the point now raised. The only cases which bear directly on the question are *Bavasha* v. *Masumsha*(3), *Amme Raham* v. *Zia Ahmad* (4) and *Patcha* v. *Mohidin* (5). The Bombay High Court held that art. 127 applies to a suit by a Mahomedan for partition of joint family property, while the Allahabad and Madras High Courts take the opposite view, and on giving our best consideration to these decisions we think that the view adopted by the Allahabad and Madras High Courts is correct. It appears to us that, strictly speaking, there is no joint family and no joint family property under Mahomedan law in the sense in which these expressions are understood in the Hindu system of law. It is true that in some parts of India Mahomedan families have adopted Hindu customs and usages, and where they have done so, they may be governed by principles of Hindu law as to joint family property. [960] But a special custom of this kind, being entirely opposed and unknown to Mahomedan law, must be alleged and proved before it can be held to be applicable to any particular case. In the present case no such custom is alleged or even alluded to in the plaint or in the issues, and it is also noticeable that the suit as framed is to recover possession of a specific share of the property left by Panchu Shaha and not for restoration to joint possession and enjoyment of that share with the defendants, which, as pointed out by some of the learned Judges of the Allahabad High Court, is the object of the suit contemplated by art. 127. On this ground alone, therefore, we think we should be justified in holding that art. 127 does not apply to the present case, but we are

(1) 5 W. R. 238. (2) 11 W.R. 45. (3) 14 B. 70. (4) 13 A. 282.
(5) 15 M. 57. (6) 22 W.R. 185. (7) 24 W.R. 1.

also of opinion that in the absence of any allegation or proof of any special custom the parties in the present suit are governed by the principles of Mahomedan and not of Hindu law relating to joint family property. In this view, and the suit on the findings of fact arrived at by the learned District Judge being admittedly barred under arts. 142 and 144 of the second schedule of the Limitation Act, we think the appeal fails, and that it is unnecessary to consider the other matters which were pressed on our attention by Mr. Hill.

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The appeal is dismissed with costs.

F. K. D. *Appeal dismissed.*

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22 C. 960.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

PREMLALL MULLICK, AN INFANT, BY HIS NEXT FRIEND, TRIGOONA SUNDERY DASSEE (*Plaintiff*) *v.* SUMBHOONATH ROY AND OTHERS (*Defendants*).* [17th July, 1895.]

Appeal to Privy Council—Erroneous order—Civil Procedure Code, s. 610, *Function of Court under—Receiver, Lien of, on estate.*

On receiving and filing under s. 610 of the Civil Procedure Code an order of Her Majesty in Council made on appeal from an order or decree of the Court of original instance, the latter Court performs a function which is purely ministerial. *Pitts* v. *La Fontaine* (1) referred to.

[961] The effect of the order, however erroneous, on the suit itself cannot be discussed on an application of this nature.

A Receiver, however, who is divested by such order, has a lien on the estate for his claims and allowances.

Bertrand v. *Davies* (2), *Fraser* v. *Burgess* (3) and *Batten* v. *Wedgewood Coal and Iron Company* (4) followed.

Semble.—The proper course for the party aggrieved by the order is to apply to Her Majesty in Council to make the necessary alteration or modification in such order.

[R., 14 C.L.J. 445 (466) =12 Ind. Cas. 780 (792) ; F., 26 M.L.J. 185=15 M.L.T. 143 (145)=23 Ind. Cas. 235.]

ON the 6th September 1893 the plaintiff instituted this suit against Sumbhoonath Roy, Kallydass Bhunjo, Debendronath Bhunjo, Upendronath Bhunjo, Hem Chunder Bhunjo, the heirs and legal representatives of Dwarkhanath Bhunjo, deceased, and the Administrator-General of Bengal, praying (*a*) for an administration of the estate of Nundo Lall Mullick deceased, (*b*) for the appointment of a Receiver, (*c*) for an injunction restraining the Administrator-General from taking possession of the estate, (*d*) for the removal of the executor-defendants from their position as trustees of the will of the testator, and for the appointment of new trustees in their places, and for a scheme to be framed for the purpose of carrying out the religious trusts of the will, (*e*) for an injunction restraining the executor-defendants from intermeddling with the estate of the deceased as trustees or otherwise, (*f*) that the executor-defendants

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* Original Civil Suit No. 596 of 1893.

(1) L.R. 6 App. Cas. 482.
(2) 31 Beav. 429.
(3) 13 Moo. P.C. 314 (346).
(4) L.R. 28 Ch. Div. 317.

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should be ordered to render an account of the estate of the deceased testator in their hands, (*g*), and that all necessary accounts might be taken, enquiries made and directions given for purposes aforesaid. The plaintiff also asked for maintenance for himself and his mother pending the final determination of the suit.

On the 21st December 1893 during the progress of the suit the plaintiff obtained an order in the suit to the effect that a transfer of the estate made by the other defendant, on the 14th August 1893 to the Administrator-General under s. 31 of the Administrator-General's Act 1874 was invalid; that the Administrator-General should be restrained from selling or disposing of any of the furniture or effects of the estate of the deceased testator, and that a Receiver should be appointed **[962]** to the said estate; that this application by the plaintiff should be treated as a hearing and that the costs of the application should be taxed on scale No. 2.

On the 21st December 1893 the Administrator-General appealed against this order, and on the 16th of March the appeal was dismissed by Mr. Justice Prinsep and Mr. Justice Trevelyan, the Chief Justice dissenting.

The Administrator-General thereupon, in accordance with the original order, handed over the estate to the Receiver appointed by the Court; but on the 2nd of April 1894 he obtained leave to appeal from the original order to the Privy Council. Before the hearing of this appeal to the Privy Council, the suit itself came on for hearing on the 7th May 1894, and a decree was made *ex parte* adjourning the further hearing of the suit and ordering a reference to the Registrar of the High Court to take the accounts, make certain enquiries and frame a scheme for the religious trusts of the estate. After the decree of the 7th May 1894 various proceedings pursuant to the decree were taken by the plaintiff. On 28th August 1894 the defendant Dwarkanath Bhunjo died, and leave was obtained by the plaintiff to amend the register of the suit by substituting the names of Kallydass Bhunjo, Debendronath Bhunjo, Upendronath Bhunjo and Hem Chunder Bhunjo, the heirs and legal representatives of Dawarkanath Bhunjo.

On 11th of May 1895 an order was made by the Privy Council that the decree of the High Court in its Appellate and Original Civil Jurisdiction of the 16th March 1894 and the 21st December 1893 be reversed and the suit be dismissed, and that the taxed costs of both parties in the said Courts as between solicitor and client and the costs of the appeal be paid and retained by the appellant out of the estate of the testator.

On the 24th June 1895 the Administrator-General made the present application in the High Court, asking that the order of the Privy Council, dated the 18th of May 1895, be received and filed in this Court, and that all the proceedings held in this suit since the 16th March 1894, including the decree of the High Court, dated the 17th May 1894, be set aside; that the Receiver appointed **[963]** in the suit be discharged from further acting as Receiver and be ordered to deliver up the estates and file his accounts.

The Officiating Advocate General (Sir *Griffith Evans*) and Mr. *Donogh*, for the Administrator-General of Bengal.

Mr. *C. P. Hill*, for Premlall Mullick.

Mr. *Jackson* and Mr. *Graham*, for the Receiver.

Mr. *J. G. Woodroffe*, for the surviving executor.

Sir *G. Evans.*—It is undoubtedly remarkable that the order should have taken the form it has, but the Privy Council had before them the whole of the points raised in the case by the pleadings. Having the plaint before them, their Lordships must have come to the conclusion that the plaint shewed no cause of action, though there might be a cause of action against the executors. It is not open to any one in this country, whatever might be the case in England, to suggest that when the Privy Council has ordered a suit to be dismissed that order is erroneous, or that it is possible for the Judges in this country to stay the execution of that order, or to delay or avoid carrying into effect the decree made by the Privy Council, on the ground that it was possibly erroneous, and that Her Majesty would probably be pleased to come to the conclusion that it was erroneous; that is not capable of discussion. It is true the application was for an injunction and an injunction order was made; still, although it might be irregular for the Privy Council to dismiss the suit itself altogether, instead of reversing the order and decree of this Court, it is not open to any one here, when the Privy Council had once made that order, to dispute that order. Somebody must be in charge of the estate; this Court cannot retain the Receiver, because the suit has been dismissed. All that the Court can do is to allow the Administrator-General to take charge for the purpose of administering the estate. Their Lordships in the Privy Council knew the nature of the whole suit and stated it in their judgment. However irregular their action may have been, no one can question their right to dismiss the suit.

Mr. *C. P. Hill, contra.*—This application ought not to be granted; at any rate not to the full extent prayed for. It cannot be granted to the full extent prayed for. The original application was for an injunction and a Receiver. It had nothing to do with the nature of the suit or with the suit itself. It was purely for the **[964]** protection of the estate and was made in the suit. In order to avoid having to render their accounts, the executors, who were the trustees, transferred the estate to the Administrator-General.

At the time of this application the suit was not heard. The Privy Council must have misunderstood the state of affairs, and thought the entire suit was before them. We wish to be put in a position now to go to the Privy Council and ask them to rectify the mistake. Macpherson on Privy Council Practice, pp. 129, 144. I wish to raise the following points: (1), in asking the Court to allow this decree to be filed, is not the Administrator-General advised to do something which is a breach of faith, namely to carry out an agreement by virtue of a mistake further than is intended by the parties? (2) Has not the Court a discretion in the matter to give us time to apply to the Privy Council to rectify the order? The notice of the order is not a notice to the High Court as a Court until it is filed; it still leaves, until filed, a discretionary power to this Court to give us time to apply. (3) If this Court cannot give us time, what further steps can it take in the matter? The moment the order is filed, the suit is at an end and is dismissed by virtue of this decree.

The decree is complete in itself. It states that the suit is to be dismissed from May 15th. This Court will then be asked to make some order in a suit which does not exist. The Receiver is told in this order to pass his accounts and get his discharge. The Court is therefore told to do something which it cannot do, namely, to discharge the Receiver in a suit which does not exist. The Receiver cannot be discharged, and would remain liable, and his children and representatives after him. I

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would therefore ask for time to apply to the Privy Council, as the orders already made in favour of either party are infructuous.

Mr. *Jackson*, for the Receiver.—I would ask the Court to let this matter stand over until the parties have time to apply. One effect of this order will be that the suit against the executors will be barred for ever. The suit was never intended to be dismissed, except as regards the Administrator-General. I, as Receiver, am entitled to be indemnified and to be paid all my costs. The position of the other side will not be injured by time being given for an application to the Privy Council. The only person [965] affected by the delay is the Administrator-General, but he runs no risk, he is only kept out of his costs for a time.

If the suit is dismissed in this way, the mother and child will be deprived of their maintenance. *Tuffuzool Hossein Khan* v. *Rughoonath Pershad* (1), *In re Ramessure Dassee* (2), *Bertrand* v. *Davies* (3), *Batten* v. *Wedgwood Coal and Iron Co.* (4), *Courand* v. *Hanmer* (5), *Makepeace* v. *Rogers* (6), Walker and Elwood on Administration Suits, p. 15.

Sir *G. Evans* in reply.—The Privy Council may have thought the remedy sought for was not properly sought for; that this, as an administration suit, must be dismissed and the remedy left against the executors. If fresh matter is brought before them, they will make a fresh order. That this Court cannot do anything, when a suit is dismissed, I will shew is erroneous. *Rodger* v. *The Comptoir d' Escompte de Paris* (7). The order of the Privy Council makes it necessary to restore the *status quo ante*. It is evident that the Privy Council did not then know about these things; that is shewn by the fact that the executors have never appeared in Court until to-day. *Barlow* v. *Orde* (8). *In re Vassareddy Lutchmeputtee Naidoo* (9), *In re Kally Soondery Debia* (10), *Harrish Chunder Chowdhry* v. *Kalisunderi Debi* (11). When the Privy Council has laid a duty on a person, it is suggested that, owing to its being erroneous, the proper course is to say, "we don't wish to fill it, we will not carry it out." To give as a reason for refusing to obey the peremptory order that there is a necessity for a further order, cannot be allowed. The Privy Council have given their final orders; the proper course is to carry them out. The order must be filed.

ORDER.

SALE, J.—This is a suit which was instituted for the administration of the estate of one Nundo Lall Mullick. The circumstances under which administration was sought were as follows:—

Nundo Lall Mullick died on the 22nd of February 1891, [966] leaving a very considerable estate. By his will dated 5th August 1889 he appointed one Sumbhoonath Roy and one Dwarkanath Bhunjo as his executors, and he created various trusts in favour of the plaintiff, who was his adopted son, and in favour of his widow Sreemutty Trigoona Sundery Dassee, and he also created various religious trusts.

It is not necessary for my present purpose that I should refer more particularly to these various trusts. On the 17th March 1891 the executors appointed by the will took out probate and entered into immediate possession of the estate and administered it, and they

(1) 14 M.I.A. 48. (2) 6 C. 106. (3) 31 Beav. 429 (436).
(4) L.R. 28 Ch. D. 317 (324). (5) 9 Beav. 3. (6) L.R. 34 L.J. Ch. 398.
(7) L. R. 3 P. C. 465. (8) 18 W.R. 175. (9) 5 M. I.A. 300.
(10) 6 C. 594. (11) 9 C. 482.

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continued in possession of the estate till the 14th August 1893, when, by a deed purporting to be made under s. 31 of the Administrator-General's Act, they transferred the estate to the Administrator-General. Immediately afterwards, that is to say on the 6th September 1893, this suit was instituted by the plaintiff as the adopted son and heir of Nundo Lall Mullick through his next friend Sreemutty Trigoona Sundery Dassee, his adoptive mother and guardian. The defendants are the executors appointed by the will and the Administrator General. The plaintiff made various charges of misconduct and waste as against the executors, and alleges that for the purpose of avoiding accountability in respect of their acts they executed the deed of transfer in favour of the Administrator-General. The plaint prayed (*a*) that the estate of the testator Nundo Lall Mullick may be administered by and under the direction of this Court; (*b*) that a Receiver may be appointed of the whole of the estate, moveable and immoveable, of the said testator, pending the final determination of this suit; (*c*) that the defendant, the Administrator-General of Bengal, may, if necessary, be restrained by and under an injunction of this Court from taking possession of the said estate of the said testator, moveable and immoveable, or interfering or intermeddling therewith in any way; (*d*) that the said executors may be removed from being trustees of the said will and that new trustees thereof may be appointed, and that a scheme for the purpose of carrying out the religious trusts of the said will may, if necessary, be framed by and under the direction of this Court; (*e*) that the said executors may be restrained by and under the injunction **[967]** of this Court from further intermeddling with the said estate as trustees or otherwise; (*f*) that the said executors may be ordered to render a true and faithful account of the estate of the said testator which have come to, or which, but for their wilful default or neglect, would have come into, their hands by and under the directions of this Court; (*g*) that all necessary accounts may be taken, enquiries made and directions given for the purposes aforesaid; (*h*) that pending the final determination of this suit proper maintenance may be fixed by this Court for the plaintiff and his mother, the said Trigoona Sundery Dassee, and be paid to the said Trigoona Sundery Dassee; (*i*) that the plaintiff may have such further and other relief as the circumstances of the case may require.

It was not questioned in argument, and indeed it is obvious, that the suit is framed with the object mainly of obtaining relief as against the defaulting executors in respect of their acts connected with the administration of the estate, while it was in their hands. The only relief which is sought against the Administrator-General is that mentioned in cls. (*b*) and (*c*) of the prayer of the plaint, that is to say, the appointment of a Receiver and an injunction as against the Administrator-General restraining him from taking possession of the estate of the testator or interfering therewith; and it appears from the body of the plaint that the claim for this relief against the Administrator-General is based on the sole ground of the alleged invalidity of the transfer executed in his favour by the executors.

It is important also to mention that at the time the suit was instituted, the Administrator-General had obtained possession of only a small portion of the estate, and shortly after the institution of the suit, that is to say on the 15th November 1893, an arrangement was come to on the part of the plaintiff and the defendants, whereby it was agreed that the issue relating to the validity or otherwise of the deed of transfer should be dealt

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with as a preliminary issue in this suit, and that it should be tried in the form of a motion for an injunction restraining the Administrator-General from selling certain moveable property appertaining to the premises known as the Seven Tanks Garden House. Accordingly the application for the injunction and also for the appointment [968] of a Receiver was made on the 18th December 1893 on the part of the plaintiff, and the only question argued or dealt with on that application was the question relating to the validity of the transfer.

On the 21st December this Court made an order declaring that the deed of transfer was invalid and appointing a Receiver of the estate, who was authorized forthwith to take over possession of the estate. The order of 21st December 1893 was appealed, the only ground of appeal being that the Court was wrong in holding that the deed of transfer was invalid. On the 16th March the Appeal Bench of this Court, who heard the appeal, by a majority upheld the order of this Court and dismissed the appeal. There was then a further appeal to the Privy Council in respect of those orders of this Court.

Pending the appeal to the Privy Council various proceedings were had in the suit. The Administrator-General was called upon by the plaintiff to file his written statement, which he declined to do. Messrs. Carruthers & Co., the attorneys who had acted for all the defendants at or about that time, intimated to the attorney for the plaintiff that they had been discharged from acting for the executor-defendants, and subsequently on notice to the Administrator-General and the executors, application was made to this Court for transfer of this suit, from the General List of Causes to the Undefended List. The defendants not appearing on that application, the order for transfer was made, and on the 7th May 1894 the case came on for hearing as an undefended suit, and the Court taking the view that the plaintiff's cause of action for administration of the estate was wholly independent of and unconnected with the question of the legality of the deed of transfer in favour of the Administrator-General, made a decree for the administration of the estate, directing the usual accounts and enquiries, and directing also the framing of a scheme for the purpose of carrying out the religious trusts of the will. Subsequent to that decree the suit proceeded as an ordinary administration suit. At the instance of the plaintiff orders were made from time to time authorising the Receiver to enter into engagements respecting the repairs necessary to be executed, to the various properties belonging to the estate. The Receiver was also directed [969] to pay a monthly sum for maintenance to Trigoona Sundery Dassee for the support of herself and her infant son. Proceedings have also been taken with the object of carrying out the administration of the estate. The executors have now brought in their accounts and filed their statement of facts. Advertisements to creditors to come in and prove their claims have been issued and published.

On the 11th May 1895 their Lordships of the Privy Council made an order reversing the orders of this Court of 21st December 1893 and 16th March 1894, and have dismissed the suit, directing that the taxed costs of both parties between solicitor and client be respectively paid and retained by the appellant, the Administrator-General, out of the estate of the testator, and that the costs of the appeal be respectively paid and retained by the appellant out of the estate of the testator. The order is as follows: "The Lords of the Committee, in obedience to your Majesty's

said General Order of Reference, have taken the said humble petition and appeal into consideration, and having heard Counsel for the appellant and for the respondent Prem Lall Mullick, no appearance having been entered on behalf of the remaining respondents, their Lordships do this day agree humbly to report to your Majesty as their opinion that the decree of the High Court of Judicature at Fort William in Bengal in its Appellate Jurisdiction of the 16th March 1894 and the decree of the said Court in its Ordinary Original Civil Jurisdiction of the 28th December 1893, ought to be reversed, and that the suit ought to be dismissed."

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It is said that the order in Council dismissing the suit was made under a misapprehension and mistake, both as to the scope of the suit which the order purported to dismiss and also in respect of the scope of the appeal which had been presented to the Privy Council in respect of the two orders made by this Court, and reference is made to a paragraph in the judgment of their Lordships of the Privy Council, which runs as follows :—

" Mr. Justice Sale, who tried the suit, found by decree, dated the 21st December 1893, that the transfer purporting to be made by the executors and trustees to the defendant, the Administrator-General, on the 14th August 1893 was invalid."

[970] It is obvious from what has been already stated that the order of the 21st December 1893 does not deal at all with the matters which form the main cause of action in the suit, and that it affects only one of the questions raised in the suit, which by arrangement between the parties and for the sake of convenience was brought on and dealt with by way of motion as a preliminary issue, and I think I may venture to say that if there has been any mistake or misapprehension on the part of their Lordships of the Privy Council as to the circumstances under which the question involved in the appeal came before them, the explanation of such mistake is not far to seek.

In the *Case for the Appellant*, presented to the Privy Council, there is, I observe, a statement made as to the nature of the suit, which is inaccurate, and which certainly suggests the inference that the principal object of the suit was to obtain an order declaring the invalidity of the deed of transfer executed in favour of the Administrator-General, and that the cause of action in respect of which administration was sought was confined to that alleged illegal transfer. Further in the closing paragraph of the case there is this submission: "It is submitted by the appellant that the judgment of the High Court should be reversed and *the suit* and injunction *dismissed* with costs."

There can be no doubt that if the legal advisers of the appellant, who are responsible for the *case* as drawn, had been aware of the arrangement between the parties under which the issue relating to the invalidity of the transfer had been dealt with by this Court, the *Case for the Appellant* would have been framed differently. I may add that the *Case for the Respondent* correctly represents the nature of the suit and the subject-matter of the appeal before their Lordships of the Privy Council.

But whatever the circumstances may be under which the order in Council was made, the present application on behalf of the Administrator-General is for an order—(1) that the order of 11th May 1895 of Her Most Gracious Majesty in Her Privy Council be received and filed; (2) that all proceedings had in this suit since the said 16th day of March 1894, including the decree of the 7th May 1894, be set aside; (3) that Mr. Osmond Beeby, the Receiver appointed in this suit under and by virtue of the said

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[971] order of the 21st December 1893, be discharged from further acting as such Receiver, and that he do forthwith deliver over possession of the said estate in his hands to the petitioner, the Administrator-General.

On behalf of the executors, who appeared at the hearing of this application, it was contended that, if the order in Council dismissing the suit was filed, some special steps should be taken with the object of providing for the costs incurred by the executors subsequent to the administration decree in bringing in their accounts. The plaintiff objects to the order sought by the Administrator-General mainly upon this ground: that the order of the Privy Council dismissing the suit was obviously made under a misapprehension, and that an application is about to be made to the Privy Council for a review of the order, and it was contended that, pending that application, it would be right and proper for this Court to stay its hand and decline to file the order, until the result of the application for review was known. Two reasons were urged for the adoption of this course. In the first place, it was said that the order, if filed, would have the effect, not only of restoring the Administrator-General to the possession of the estate, which admittedly was the result contemplated by the order, but it would introduce a new state of things, namely, it would deprive the plaintiff of his right to relief against the defaulting executors and for administration of the estate, which right was independent of the question of the legality of the transfer to the Administrator-General.

In the next place it is said that the order, if filed, would produce as its necessary result the dismissal of the suit and the discharge of the Receiver, and, the suit being once dismissed, it would be impossible for the Court to make further orders or to take the necessary steps for the protection of the estate or of the Receiver.

These arguments I shall deal with in turn, but I feel bound to say that as regards that part of the application which asks that the order in Council may be filed, I have arrived at the conclusion that I am bound to accede to it as a matter of course.

In receiving and filing for the purpose of execution an order of Her Majesty in Council made on appeal from an order or decree of this Court, it seems to me that this Court does not exercise a [972] discretionary power, but performs a function of purely ministerial character. Section 610 of the Civil Procedure Code provides that the Court, to which an order of Her Majesty in Council is transmitted for execution, shall enforce or execute it in the manner and according to the rules applicable to the execution of its original decrees. Now the filing of an original decree of this Court is according to its rules, although a necessary preliminary to execution, a ministerial act. *Execution* of a decree or order once filed may no doubt be stayed on various grounds, but no question of stay of execution, strictly speaking, arises on the present application, and I may perhaps on the point as to what the duty of this Court is in respect of an order of Her Majesty in Council transmitted to this Court refer to the observations of the Privy Council reported in the case of *Pitts* v. *La Fontaine* (1). On page 483, Sir James Colville says: "When a decision of this Board has been reported to Her Majesty and has been sanctioned and embodied in an order of Council, it becomes the decree or order of the final Court of Appeal, and it is the duty of every subordinate tribunal to whom the order is addressed to carry into execution."

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(1) L.R. 6 App. Cas. 482 (483).

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It is said however that in filing the order dismissing the suit, I should be doing an injustice to the plaintiff, which their Lordships of the Privy Council never could have intended or contemplated. The answer is that either the order in Council was made with a full knowledge and accurate apprehension of the scope and object of the suit and the limited character of the question involved in the appeal, or it was made under a mistake or misapprehension as to these matters.

In the former case the effect of the order, whatever it may be, must be taken to have been intended, and this Court would be powerless to interfere. In the latter case it must be taken that on a proper representation being made to their Lordships of the Privy Council, they will make the necessary alteration or modification in their order, which the justice of the case would seem to require.

Neither hypothesis can form a good ground for declining to file the order or to give effect to the intention and directions of the final Court of appeal, so far as they have been clearly expressed.

The question as to the effect of the order on the suit generally is **[973]** not one which can be conveniently discussed upon the present application, and I think it is right I should decline to express an opinion upon it at present. It is however beyond all doubt that the order of this Court declaring the invalidity of the transfer to the Administrator-General and appointing a Receiver has been reversed by the order in Council, and a clear indication is given in the order that the Administrator-General should be restored to the possession of the estate. The order of dismissal of the suit which follows on the reversal of the order appointing the Receiver clearly operates as a discharge of the Receiver and was intended so to operate. It therefore remains for this Court, in whose possession the estate is, to take the necessary steps for the protection and preservation of the estate consequent on the discharge of the Receiver. Nor do I think the filing of the order dismissing the suit can in any respect operate prejudicially as against the Receiver. I should be sorry to think that there is any real doubt or misapprehension as to the position of the Receiver in this case. A Receiver, though discharged by the dismissal of the suit in which he was appointed, is entitled to a lien on the estate for all his just claims and allowances. In the case of *Bertrand* v. *Davies* (1) the M. R. at p. 436 says as follows: "Where a Receiver or manager is appointed by the Court in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance and also to a lien on the estate, as against all persons interested in it for the balance, whatever it may be, that shall be found to be due to him on taking his accounts.

And on the same point the cases *Fraser* v. *Burgess* (2) and *Batten* v. *Wedgwood Coal and Iron Co.* (3) may be referred to.

On this principle it follows that the Court will not compel a Receiver, who has been discharged, to make over the property in his possession, until his lien has been satisfied or provided for by a sufficient indemnity.

The order I make on this application is:—

1. That the order of Her Majesty in Council of 11th May 1895 be received and filed.

[974] 2. That the Receiver do proceed to pass his final accounts and on satisfaction of what may be due to him, and, on being sufficiently indemnified as to any engagements properly entered into by him during

(1) 31 Beav. 429. (2) 13 Moo. P. C. 314 (346). (3) 28 Ch. Div. 317 (324).

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his management of the estate, he do make over possession to the Administrator-General.

3. That the costs of the Administrator-General, of the Receiver and of the plaintiff in the present application be paid out of the estate by the Receiver, and that such costs be taxed as between attorney and client. If however possession of the estate is made over to the Administrator-General before the costs are paid, then the Administrator-General will pay the costs. I can make no order at present on Mr. Woodroffe's application on behalf of the executor-defendants. They may however have liberty to make such application on a future occasion as they may be advised.

Attorneys for the Administrator-General of Bengal : Messrs. *Carruthers & Co.*

Attorney for Prem Lall Mullick : Babu *Gonesh Chunder Chunder.*

Attorney for the Receiver: Babu *Lakshmi Narain Khettry.*

Attorney for the Executors : Babu *Kedarnath Mitter.*

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22 C. 974.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

BARODA KANTA CHATTAPADHYA (*Plaintiff*) *v.* JATINDRA NARAIN ROY AND ANOTHER, MINORS, BY THEIR CERTIFICATED GUARDIAN GURU PADO MUKHOPADHYA (*Defendants*).* [10th July, 1895.]

Hindu law—Widow—Mesne profits payable under a decree against a Hindu widow and other defendants—Subsequent suit for contribution against the widow by one of the defendants from whom the whole amount of mesne profits had been realized—Sale in execution of decree—Rights of the auction-purchaser.

M, widow of *N*, a Hindu, and *K* (brother of *N*) jointly brought a suit against *C*, her sons and others, for recovery of possession of certain property which had devolved upon *N*, and *K*, by inheritance, obtained a decree and were put into possession. *G*, one of the sons of *C*, subsequently brought a suit against *M* and the legal representatives of *K* then deceased, and [975] also against *J* (to whom *K* had sold a portion of the property after the decree), and obtained a decree with mesne profits for his share of the same property. *G* then sold the decree to *R*, who executed it for mesne profits against *J* alone, and realized the entire decretal amount from him. *J* thereupon brought two suits for contribution against *M* and the legal representatives of *K*, on account of the mesne profits payable by them, according to their respective shares, and obtained decrees. In execution of one of these decrees passed against *M* he sold the property in suit belonging to the estate of *N*, and purchased a moiety of it himself. In a suit on the death of *M* by the reversionary heirs of *N* to recover possession of his share of the property, in which his widow *M* had only a life-interest, on the allegation that only her life-interest and not the entire estate passed :

Held, that the suit for contribution brought by *J* was a suit to recover a debt due by the estate. The amount of the debt in the shape of mesne profits had been decreed against *M* and others, as representing the estate of *N* and *K*, and it was not therefore a personal debt of *M*. That being so, the purchaser at the auction sale took the entire estate and not merely the qualified interest of the widow.

Jugul Kishore v. *Jotendro Mohun Tagore* (1) referred to.

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*Appeal from Appellate Decree No. 1810 of 1893, against the decree of R. H. Anderson, Esq., Officiating District Judge of Moorshedabad, dated the 14th June, 1893, reversing the decree of Babu Debendra Chundra Mookerjee, Munsif of Berhampore, dated the 9th of January 1893.

(1) 10 C. 985.

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The facts of the case, for the purpose of this report, are sufficiently stated in the judgment of the High Court.

Babu *Harendra Narayan Mitter* (for Babu *Promotha Nath Sen*), for the appellant.

Babu *Sreenath Das* and Babu *Saroda Churn Mitter*, for the respondents.

Babu *Harendra Narayan Mitter.*—The question is whether the personal interest of the widow or the absolute estate passed by the sale in execution of the decree obtained in the contribution suit by Jiban Gopal. In the first place the liability of the widow in possession to pay the mesne profits decreed to Girish Chunder arose out of her own enjoyment of the estate. The widow having enjoyed the profits of the estate was personally liable to satisfy the claim for mesne profits. The decree for mesne profits could not therefore bind the whole estate, and the execution issued in the subsequent contribution suit cannot affect more than the personal interest of the widow. In the second place, even conceding that the decree for mesne profits being part of the decree for recovery of possession obtained by Girish Chunder against Manikmoni, the widow, while defending the estate, and not merely her personal interest, was binding on the inheritance. I submit the [976] suit in which the execution issued though arising out of the claim for mesne profits, being one for contribution, was purely a personal action against the widow, and only her personal interest passed. A nature of the suit should only be looked at in determining the question whether the entire estate or the qualified interest of the widow passed. See *Jugul Kishore* v. *Jotendro Mohun Tagore* (1). Even if the original foundation of the liability be such as to bind the estate, the suit for enforcing such liability should be expressly framed for the purpose of binding the estate, otherwise the whole estate could not pass. See *Kistomoyee Dassee* v. *Prosanno Narain Chowdhry* (2), *Nugender Chunder Ghose* v. *Kaminee Dossee* (3), *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (4), *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (5), *Kristo Gobind Majumdar* v. *Hem Chunder Chowdhry* (6), and Mayne's Hindu Law and Usage, 5th Ed., p. 739.

The Judge has taken an erroneous view of the law. The case of *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) referred to in his judgment is distinguishable. The cause of action there was not against the widow personally. She only represented her husband's interest in the suit against the family. Moreover the sale took place in execution of the decree for mesne profits in the suit in which the widow was representing her husband's estate, and not in execution of a subsequent personal decree against the widow as in the present case.

Babu *Saroda Churn Mitter*, for the respondents.—The case is not really distinguishable from the case of *Jugul Kishore* v. *Jotendro Mohun Tagore* (1). All the members of the family were defending the suit brought by Girish Chunder. The widow Manikmoni with other members of the family were defending the estate and not merely her personal interest; and the mesne profits were debts due by the estate in her possession. The nature of the debt was not changed because the debt by the estate was realized by a contribution suit. The execution sale passed the whole estate and not merely the widow's life-interest.

Babu *Harendra Narayan Mitter* in reply.

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(1) 10 C. 985. (2) 6 W.R. 304. (3) 11 M. I. A. 241.
(4) 15 B.L.R. 142=23 W.R. 174. (5) 1 C. 133=2 I.A. 275.
(6) 16 C, 511.

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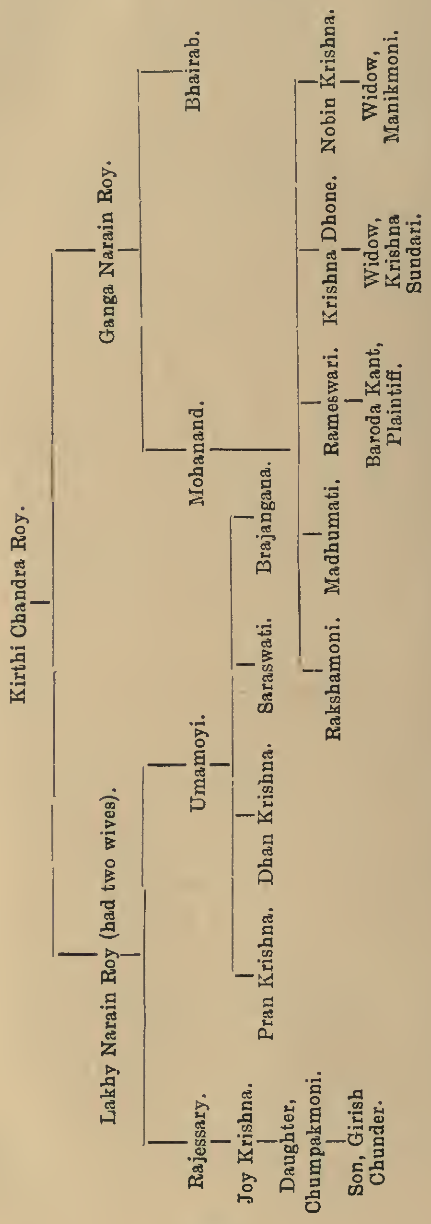
The judgment of the Court (NORRIS and GORDON, JJ.) was as follows :—

JUDGMENT.

[977] The property which is the subject-matter of this suit formed part of the estate of Kirthi Chandra Rai which descended in the usual course to his grandsons Pran Krishna and Dhan Krishna.

The following genealogical table explains the descent :—



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[978] On the death of Pran Krishna and Dhan Krishna their mother Umamoyi succeeded, and on her death the property devolved on Krishna Dass and Nobin Krishna, and on their demise without issue Nobin's widow, Manikmoni, succeeded to his share of the estate, and Krishna's widow, Krishna Sundari, and his sisters, Rakshamoni and Modhumati, succeeded to his share under a will left by him. In 1863 Krishna (who survived Nobin) and Manikmoni brought a suit against Saraswati, Brajangana, Chumpakmoni, and her sons, to recover possession of the property left by Pran and Dhan Krishna, obtained a decree and were put in possession, and subsequently Krishna sold a portion of the property to Jiban Gopal. In 1872, after Krishna's death, Girish Chunder, one of the sons of Chumpakmoni, sued Manikmoni, Krishna Sundari, Rakshamoni, Madhumati, and Jiban Gopal to recover possession of one-third of the property left by Pran and Dhan Krishna, alleging that he had not been properly represented in the suit against his mother in 1863. He obtained a decree in the appellate Court for the share claimed with mesne profits and costs. He then sold the decree to Ramnath Roy, father of the defendants, who executed it for mesne profits against Jiban Gopal alone, and realized the entire decretal amount from him. Subsequently Jiban Gopal brought two suits for contribution against Krishna Sundari, Manikmoni, Rakshamoni and Madhumati and obtained decrees, and in execution of one of these decrees, No. 52 of 1883, he sold the property in suit and purchased a moiety of it himself. The other half was purchased by Ramnath, who subsequently bought the moiety purchased by Jiban Gopal, and thus became the sole owner of the property in suit. Manikmoni died in Assin 1291 B.S. Plaintiff is the son of Nobin Krishna's sister, Rameswari, and he has brought this suit as reversionary heir of Nobin Krishna to obtain possession of his share of the property, in which his widow Manikmoni had a life-interest, on the allegation that only her life-interest and not the entire estate passed at the sale in execution of Jiban Gopal's decree. The main ground of defence was that the decree obtained by Jiban Gopal was for a debt due by Nobin's estate and not for a mere personal debt of the widow, and that in execution the whole estate was liable to be sold, and that it was sold and passed to the purchasers. The **[979]** Munsif gave the plaintiff a decree. His reasons are given in the following passage of his judgment :—

"I am decidedly of opinion that the suit which was brought by Manikmoni and Krishna Dass for declaration of right of inheritance to the properties left by Dhan Krishna and Pran Krishna, was one in which Manikmoni represented her husband, Nobin Krishna. They were successful. A portion of the property so obtained by them was successfully recovered by Girish Chunder, *viz.*, one-third, and the two-thirds still either remain in their hands, or in the hands of their successors and vendees and putnidars. It was, however, neither Girish nor his assignee who caused sale of the properties, but it was in connection with the contribution decree obtained by Jiban Gopal, one of the judgment-debtors, that Manikmoni's property was sold. Here the suit was between a creditor and a debtor, and Manikmoni does not appear to me as representing her husband Nobin Krishna, so that, although the former part of the litigation is on all fours with the cases reported in the 7th and 10th Indian Law Reports, Calcutta, the latter portion is quite different. I am therefore of opinion that a widow's interest only passed and not the whole inheritance of Nobin Krishna. The property of Manikmoni was sold in execution of a decree in a suit between a creditor and a debtor."

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On appeal the District Judge reversed the Munsif's decision. He observes :—

"It seems to me clear enough that Manikmoni, not only in the suit to recover the property from Brajangana and others, but in all the subsequent litigation which arose out of that suit, was representing her husband's estate and had not merely a personal interest [*Jugul Kishore* v. *Jotendro Mohun Tagore* (1)]. She was defending not only her own but the reversioner's interests when she sued Brajangana and others. She was doing the same when she defended the suit brought by Girish Chunder, and therefore, I think, the decree for *wasilat* was clearly one which bound the estate and not only Manikmoni personally. In fact, the reversioners, we know, have benefited by the suit brought against Brajangana, Saraswati and others, for they have obtained what Manikmoni then succeeded in recovering *minus* what Girish Chunder succeeded afterwards in depriving her of. Girish Chunder's suit clearly arose out of the suit by which, as I have just shown, the reversioners have benefited."

And further on the Judge says:—

"The question really is, was the suit against Manikmoni merely for a personal claim against her or against her in respect of the estate or for a cause of action which was not a mere personal cause of action. *Jugul Kishore* v. *Jotendro Mohun Tagore* (1). The decree for *wasilat* was given in a suit in which Manikmoni was defending, and it seems properly defending, not only her own but the reversioner's interest. If **[980]** Girish Chunder or his assignee Ramnath Roy had sold the property in suit in execution of the decree for *wasilat*, I fail to see how only Manikmoni's life-estate would have been sold. Then what difference does it make when Manikmoni, being jointly liable with Jiban Gopal and Krishna Dass for the whole of the *wasilat*, was sued by Jiban Gopal for contribution, on the ground that he had had to pay all the *wasilat*? Surely the character of the claim against Manikmoni was not changed; all that was done was to fix the amount of her share of the *wasilat*."

In second appeal the learned pleader for the plaintiff, while conceding that in the previous litigation Manikmoni represented her husband's estate, and that in execution of Girish Chunder's decree the whole estate was liable to be sold to satisfy the decree for mesne profits, strongly contended that this was not sufficient. He argued that Jiban Gopal ought to have framed his suit for contribution in such a manner as to show that he intended to bind the whole estate and not to make a mere personal demand against the widow, and in support of this proposition he referred us to the cases of *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (2), *Kistomoyee Dassee* v. *Prosunno Narain Chowdhry* (3), *Nugender Chunder Ghose* v. *Kaminee Dossee* (4), *Kristo Gobind Majumdar* v. *Hem Chunder Chowdhry* (5), *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (6), and to Mayne's Hindu Law and Usage, 5th edition, p. 739. On the other hand, the learned pleader for the respondents relied on the case of *Jugul Kishore* v. *Jotendro Mohun Tagore* (1), which he contended is not distinguishable from the present case. We have considered the authorities cited and the arguments addressed to us, and we are of opinion that the learned District Judge has taken a correct view of the law in this case. We think the principle enunciated in the case of *Jugul Kishore* v. *Jotendro*

(1) 10 C. 985.
(2) 1 C. 133= 2 I.A. 275.
(3) 6 W. R. 304.
(4) 11 M.I.A. 241.
(5) 16 C. 511.
(6) 15 B.L.R. 142=23 W. R. 174.

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Mohun Tagore is the principle which is applicable to the present case. In their judgment in that case their Lordships of the Privy Council say: "The case depends on the nature of the suit in which execution issues. There are many authorities to that effect. It is unnecessary to recapitulate them; they are referred to by the Chief Justice in his judgment in the High [981] Court. If the suit is simply for a personal claim against the widow then merely the widow's qualified interest is sold and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes. In many of the cases, although the right, title and interest of the widow had been sold, the whole interest in the estate was held to have passed and the reversionary heir to be bound by it."

The suit for contribution brought by Jiban Gopal was a suit to recover a debt due by the estate. The amount of the debt in the shape of mesne profits had been decreed against Manikmoni and others as representing the estate of Nobin Krishna and Krishna Dass, and it was not, therefore, in our opinion, a personal debt of Manikmoni, that is to say, a debt contracted by her for which she was personally liable. We do not think that the character of the debt was changed merely because Jiban Gopal paid the whole of the mesne profits and then brought a suit to recover the amount from the other judgment-debtors. He paid the whole of the mesne profits and he then sued to recover these mesne profits from Manikmoni and others. In this view we are of opinion that the cases cited by the learned pleader for the appellant are not strictly applicable to the present case, and that the decision of the Privy Council in the case of *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) does apply.

The appeal fails and is dismissed with costs.

S.C.G. *Appeal dismissed.*

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22 C. 981.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Stevens.

CHINTAMONY DASSI (*Defendant*) *v.* RAGHOONATH SAHOO (*Plaintiff*).* [3rd June, 1895.]

Appeal—Civil Procedure Code (*Act XIV of* 1882), *ss.* 108, 591—Ex parte *decree—Order setting aside* ex-parte *decree.*

The words "affecting the decision of the case" in s. 591 of the Civil [982] Procedure Code mean "affecting the decision of the case with reference to the merits of it."

Where an *ex parte* decree was set aside by an order under s. 108 of the Civil Procedure Code, and the suit heard upon the merits and dismissed: *Held*, that such order was not an order affecting the decision of the case under s. 591 and was not appealable under that section.

[F., 24 A. 464=22 A.W.N. 136; 25 A. 280 (282)=23 A.W.N. 39; 8 C.L.J. 308 (310); 9 C.W.N. 584 (587); 2 N.L.R. 179 (189); Appl., U.B.R. (1897—1901), 237;

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* Appeal from Appellate Decree No. 1340 of 1894, against the decree of Babu Hurro Gobind Mookerji, Subordinate Judge of Bhagalpur, dated the 21st of May 1894, reversing the decree of Babu Debendra Nath Roy, Munsif of Bhagulpur, dated the 7th of October 1893.

(1) 10 C. 985.

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R., 34 A. 592 (595) = 10 A.L J. 130 = 16 Ind. Cas. 1; 26 B. 201 = 3 Bom.L.R. 734; 12 Ind. Cas. 795 = 7 N.L.R. 162; 25 P.R. 1914 = 157 P.L.R. 1914 = 23 Ind. Cas. 919.]

THIS was a suit, brought in the Court of the Munsif of Bhagalpur, for money due on a mortgage bond. It was decreed *ex parte* on the 27th of February 1890. In execution of that decree notice was served on the debtor on the 19th September 1892, and proclamation of sale was made on the 7th November following. On the application of the defendant the Munsif set aside the *ex parte* decree on the 31st December 1892. The suit was then heard on the merits and dismissed. The plaintiff, who appealed to the Subordinate Judge of Bhagalpur, contended on appeal that the application to set aside the *ex parte* decree was barred by limitation under s. 164 of the Limitation Act, and that the said decree could not, therefore, be set aside. On behalf of the defendant it was contended, on the authority of *Sankali* v. *Murlidhar* (1), that the question of limitation was one of fact, and that the decision of the Munsif on that point could not be interfered with on general appeal.

The Subordinate Judge of Bhagalpur reversed the Munsif's decree, and restored the *ex parte* decree, on the ground that the order made under s. 108 of the Civil Procedure Code, setting aside the *ex parte* decree, was wrong. From this decision the defendant brought this appeal to the High Court.

Babu *Dwarkanath Chuckerbutty* and Babu *Lakshmi Narain Singh*, for the appellant.

Babu *Lal Mohun Das* and Babu *Joy Gopal Ghosa*, for the respondent.

JUDGMENT.

The judgment of the Court (PIGOT and STEVENS, JJ.) was delivered by

PIGOT, J.—This is an appeal from a decision of the Subordinate Judge of Bhagalpur, reversing a decree made by the Munsif, on the ground that an order made by the Munsif under s. 108 of the Civil Procedure Code, setting aside an *ex parte* [983] decree previously had before him in favour of the plaintiff, was wrong.

The Munsif, after setting aside the *ex parte* decree, heard the case upon the merits, decided in favour of the defendant, and dismissed the suit. The decision, therefore, of the Subordinate Judge setting aside (on the ground of limitation) the order of the Munsif under s. 108, and setting aside the decree arrived at by him at the subsequent hearing, substitutes for the decision on the merits an *ex parte* decision previously come to, without the defendant's case being heard at all.

The Subordinate Judge, in setting aside the decree of the Munsif, and restoring the *ex parte* decree, did not, of course, go into the merits of the case. He dealt with the order made by the Munsif under s. 108 as being appealable under s. 591, upon the case coming before him on general appeal, and amongst the different points that have been raised before us is the question whether or not under s. 591 it was competent for the Subordinate Judge to set aside the order under s. 108 which had been made by the Munsif.

(1) 12 A. 200.

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We are of opinion that it was not competent for the Subordinate Judge to set aside that order under s. 591. By that section, "if any decree be appealed against, any error, defect or irregularity in any such order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." Now the error or defect or irregularity which the Subordinate Judge found in the Munsif's order was that it was made after time, that is to say, after the thirty days provided by art. 164 of the Limitation Act had elapsed. But then the question is whether the Munsif, in making the order that the case should be heard upon the merits, made an order "affecting the decision of the case" within the meaning of s. 591. We do not think that that section applies to an order setting aside an *ex parte* decree under s. 108. The object of s. 108 is to ensure that the defendant shall get a hearing, notwithstanding that he did not appear when the case was called on, if he had not been served with summons, or was prevented by sufficient cause from appearing. The first object and purpose for which Courts **[984]** sit is, of course, that the parties shall be heard; the object of s. 108 is to ensure within reasonable limits as to public convenience that every defendant shall have a hearing. An order under s. 108 is not appealable under s. 588. Unless an order under that section is appealable by reason of its being an order "affecting the decision of the case," it is not appealable under s. 591. Now in one sense it affects the decision of the case, because it ensures a decision upon the merits, and sets aside a decision which has not been obtained upon the merits, but we cannot think that that can be an "affecting" within the meaning of the words "affecting the decision of the case." We think that the words "affecting the decision of the case" must be taken to mean "affecting the decision of the case with reference to the merits of it," and that an order under s. 108, which merely ensures a hearing upon the merits, cannot be considered to be an order "affecting the decision of the case" under s. 591.

We, therefore, set aside the decision of the Subordinate Judge, and we remand the case to him, in order that he may proceed with the hearing of the appeal according to law, upon the merits.

F. K. D. *Case remanded.*

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22 C. 984.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Stevens.

BARODA CHURN GHOSE (*Defendant*) v. GOBIND PROSHAD TEWARY AND OTHERS (*Plaintiffs*).* [9th July, 1895.]

Appeal—Order granting review of judgment—Civil Procedure Code (*Act XIV of* 1882), s. 629.

In general final appeal an order for review can only be challenged upon the grounds stated in s. 629 of the Civil Procedure Code. *Har Nandan Sahai* v. *Behari Sing* (1) followed.

[**F.**, 24 C. 878 (880); 14 Ind. Cas. 39; **R.**, 27 M. 602 (607) = 14 M.L.J. 321; 33 P. R. (1902) = 24 P.L.R. (1902); **D.**, 9 Ind. Cas. 320.]

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* Appeal from Appellate Decree No. 1084 of 1894 against the decree of Babu Karoonamoy Banerjee, Subordinate Judge of Midnapore, dated the 30th of March 1894, affirming the decree of Babu Benode Behary Mitter, Munsif of Ghatal, dated the 14th of December, 1892.

(1) 22 C. 3.

1895 JULY 9

APPELLATE CIVIL.

22 C. 984.

THIS was a suit brought in the Court of the Munsif of Ghatal [985] in the district of Midnapur for rent of a *putni* taluk from Kartik 1298 to Jeyt 1299, at the rate of Rs. 834 4 ans. 18 gundas sicca or Rs. 1,889 15 ans. 10 gundas Company's coin, a year, with cesses, *dak* charges and interest. The *putni*, which formerly stood in the names of Kissen Kumar Moshanta and his co-sharers, was put up to sale under Regulation VIII of 1819 and purchased by the defendant on the 14th of May 1891.

The defendant contended that the *putni* was in the possession of his relative Anada Churn Das, on whose death it was in the occupation of his minor sons, Kuloda Chunder Das and Mohini Mohun Das; that the plaintiffs having put up the property to sale without the knowledge of the *talukdars*, he (the defendant) purchased it at auction for the benefit of the minors and the protection of their interests, and sold it back to them by a registered deed of sale; that he had never been in possession and was not liable for the rent; that the *jama* payable for the *putni* was Rs. 834 4 ans. 18 gundas and not Rs. 889 15 ans. 10 gundas as stated in the plaint; that the plaintiffs were not entitled to any *dak* charges; and that the rent and cesses for 1298 had been paid in full on behalf of the minors.

The following issues were raised :—

1.—Whether the defendant is liable for rent?

2.—What is the *jama* annually payable for the *putni?*

3.—Whether plaintiffs are entitled to the *dak* charges claimed?

4.—Is the plea of payment true?

The Munsif found that the defendant was liable for the rent, that the *jama* was Rs. 834 4 ans. 18 gundas, and that the claim in regard to *dak* charges was not proved. As regards the fourth issue a receipt for Rs. 485 4 ans. 10 gundas, purporting to have been granted by the plaintiff's *ammukhtear* on the back of an *istahar*, was put in evidence by the defendant. This receipt the Munsif held to be a forgery. The Munsif accordingly gave a decree in part to the plaintiff. Against this decree both parties appealed to the Subordinate Judge of Midnapur who dismissed the plaintiff's appeal and decreed the defendant's appeal, finding that the receipt was genuine, and that it was for a *jama* at the [986] higher rate claimed by the plaintiff and giving the defendant credit for the amount stated in the receipt. The plaintiffs applied for a review of judgment which the Subordinate Judge granted making the following order: "After hearing both sides this Court is of opinion that there is an error in the judgment of this Court which may have affected the petition for review. The error relates to the amount entered in the disputed receipt which this Court took to be a moiety of the higher *jama* claimed, whereas in fact it was not so. The application for review is granted and the appeal will be reheard on the only point referred to." On rehearing the appeal the Subordinate Judge found that the payment pleaded was not proved and restored the finding of the Munsif on that point. Hence the defendant brought this appeal to the High Court on the following grounds:—

First.—That the Court of Appeal below had granted a review of its judgment without good and sufficient cause within the meaning of s. 623 of the Code of Civil Procedure.

Second.—That the Court of Appeal below had reversed its previous judgment on review merely on a reconsideration of the evidence dealt with in that judgment, whereas it ought not to have done so.

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Third.—That the Court of Appeal below in disposing of the review ought not to have gone beyond the point to which the rehearing of the case was confined, whereas it had, without at all considering that point, reversed its previous judgment on a reconsideration of the evidence.

Dr. *Rash Behari Ghose* and Babu *Bepin Behari Ghose* (junior), for the appellant.

Babu *Sree Nath Dass* and Babu *Promotho Nath Sen*, for the respondents.

Dr. *Rash Behari Ghose.*—Objections to an order granting a review can be taken on appeal from the final decree. *Bhyrub Chunder Surmah Chowdhry* v. *Madhub Ram Surmah* (1). That case was decided under the old Code (Act VIII of 1859), but the rule is the same under the present Code, and the practice has been **[987]** uniform. See *Roy Meghraj* v. *Beejoy Gobind Burral* (2), *Banee Madhub Bose* v. *Kalee Churn* (3), *Muneeroodeen* v. *Kadir Buksh* (4), *Koleemooddeen Mundul* v. *Heerun Mundul* (5), *Joy Kishen Mookerjee* v. *Parbutty Churn Ghosal* (6) and *Chunder Churn Auggrodany* v. *Loodunram Deb* (7). The grounds on which an order granting a review may be attacked are laid down in s. 629 of the Civil Procedure Code, and no appeal lies from such an order except as provided by that section. But that section deals only with appeals from orders granting a review directly; and it does not say that no objections other than those mentioned may be taken in an appeal against the final decree. The recent case of *Har Nandan Sahai* v. *Behari Sing* is against my contention. It would seem from the judgment at first sight that the matter dealt with referred to an appeal from an order granting a review; but the report shows that the appeal was an appeal from the final decree, and the decision in that case is not supported by the case of the *Bombay and Persia Steam Navigation Co.* v. *S. S.* "*Zuari*" (8) relied on in the judgment. In the Bombay case the appeal was *directly* from an order granting a review, and it was held that no such appeal was allowed except on the grounds mentioned in s. 629. It could not have been intended that an order granting a review, although not made according to law, is not liable to be questioned at all. The order in this case was not according to law. See *Chunder Churn Auggrodany* v. *Loodunram Deb* (7). *Gopal Das* v. *Alaf Khan* (9) also shows that an order dismissing an appeal under s. 629 can be questioned in an appeal from the final decree.

Babu *Sree Nath Das*, for the respondents.—The propriety of an order granting a review cannot be attacked in final appeal on grounds other than those in s. 629. The words "or may be taken in any appeal against the final decree or order made in the suit" clearly limit the grounds of appeal against the order in final **[988]** appeal to the grounds stated in the section. The cases of the *Bombay and Persia Steam Navigation Co.* v. *S. S.* "*Zuari*" (8) and *Har Nandan Sahai* v. *Behari Sing* (10) are entirely in my favour.

JUDGMENT.

The judgment of the Court (PIGOT and STEVENS, JJ.) was delivered by

(1) 11 B. L. R. 423=20 W. R. 84. (2) 1 C. 197=23 W. R. 438.
(3) 24 W.R. 387. (4) 24 W. R. 410 (5) 24 W.R. 186.
(6) 22 W. R. 183. (7) 25 W.R. 324. (8) 12 B. 171.
(9) 11 A. 383. (10) 22 C. 3.

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PIGOT, J.—The only question in this appeal is whether the decree of the lower appellate Court must be set aside by reason of the review having been allowed under the circumstances under which it was granted ; it was not granted on any of the grounds stated in s. 629, and the question which was argued before us is, whether it is competent in final appeal to challenge the propriety of an order granting a review on grounds other than those stated in s. 629.

Upon this question the case of *Har Nandan Sahai* v. *Behari Sing* (1) was cited before us, and we have come to the conclusion that that case properly interpreted must be held to decide that in general final appeal an order for review cannot be challenged save upon the grounds stated in s. 629, and we shall follow that case in deciding the question before us against the appellant and in support of the decision of the lower appellate Court.

In the case of *Har Nandan Sahai* v. *Behari Sing* (1), the Bombay decision in the case of the *Bombay and Persia Steam Navigation Co.* v. *S. S. "Zuari"* (2) was treated as the basis of the decision of this Court. No doubt the Bombay case only decided, so far as appears from the report, that an appeal direct from an order granting a review lies only in the cases set forth in s. 629. That was a case directly under s. 629, but the Judges in the case of *Har Nandan Sahai* v. *Behari Sing* declared that the Bombay case was directly in point in the case before them. Now, in the Calcutta case, the appeal was not an appeal direct against the order ; the order was contested in final appeal upon grounds other than those set forth in s. 629 ; the proceedings after review were set aside by the District Judge on those grounds ; and the case **[989]** was decided by him on the evidence existing on the record previous to the granting of the plaintiff's application for a review. This is just what we are asked on grounds other than those specified in s. 629 to order here. This Court held that the District Judge was wrong, set aside his decision, and sent back the case to him to decide the other questions arising in the appeal, that is to decide the case upon the evidence taken after the order of review (see page 4, line 7). The case is therefore a decision that in final appeal the order for review can only be challenged upon the grounds contained in s. 629. That is, as urged by the learned pleader for the respondents, that the words in s. 629 "or may be taken in any appeal against the final decree or order made in the suit" restrict the grounds of appeal against the order in final appeal to the grounds stated in the section. This no doubt greatly limits the checks and restrictions on the powers of the lower Courts in granting reviews. But just as in the case of orders setting aside *ex parte* decrees, it may well be that the Code does not seek to supervise with very jealous scrutiny the exercise of powers which after all tend to a complete enquiry and consideration of the case upon the merits.

Therefore construing the case of *Har Nandan Sahai* v. *Behari Sing* in the manner we have done, and following it as we think we ought to do, we must decide this case in favour of the respondents and dismiss the appeal with costs.

F. K. D. *Appeal dismissed.*

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(1) 22 C. 3. (2) 12 B. 171.

22 C. 989.

1895 MAY 21.

APPEL-LATE CIVIL.

22 C. 989.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Stevens.

PROSUNNO KUMAR ADHIKARI AND OTHERS (*Plaintiffs*) v. SARODA PROSUNNO ADHIKARI AND OTHERS (*Defendants*).*
[21st May, 1895.]

Hindu law—Endowment—Powers of Shebait—Alienation of endowed property.

Where the father of the plaintiffs, who was a *shebait* of certain *debutter* property, granted a *mourasi mokurari* lease of a portion of that property to **[990]** his co-*shebait*, the grandfather of the defendants, such lease being granted without any legal necessity, *held*, that such lease was wholly void.

[F., 12 C.W.N. 98 (102); R., 16 C.L.J. 349=16 Ind. Cas. 927=17 C.W.N. 873.]

IN the year 1123 (1716) the Rajah of Tumluk dedicated some 675 bighas of land to the worship of the idol Iswar Bishnu Hori Jui, whose temple is at Tumluk. Originally one or two *shebaits* were appointed, but their office being hereditary their number gradually increased, till at length they came to an arrangement, whereby each *shebait* was to perform the *sheba* for a specified number of days in the month, and to hold exclusive possession of a part of the *debutter* land proportionate to the length of his *pala*. There was, consequently, a partition of the *debutter* property, and 88 bighas thereof fell to the share of an ancestor of the plaintiffs. In Bysack 1240 (April 1833) the father and paternal uncles of the plaintiffs jointly executed a *mourasi mokurari* lease of 53 bighas of the said 88 bighas in favour of Modon Mohan Adhikari, the grandfather of the defendants, who was himself a *shebait* holding another portion of the *debutter* land. Modon Mohan, and after him his son, Lukhi Narain, continued in possession of the lease-hold land, and the defendants have been in possession since the death of their father Lukhi Narain. The father of the plaintiffs survived his brothers and cousins and inherited their shares. He died in Pous 1298 (December 1891), and the plaintiffs having thus become *shebaits* in his place, brought this suit in the Court of the Subordinate Judge of Midnapur to set aside the *mourasi* and *mokurari ijara potta* and recover *khas* possession of the land covered by it, alleging that their predecessors as *shebaits* had no right to execute a lease in perpetuity at a fixed rent. It was decided in that Court that the lease could not be wholly set aside, but that its *mokurari* character could not be maintained, and that the plaintiffs were entitled to enhance the rent, if absolutely necessary, to the extent required to meet the necessary expenses of the Thakur's *sheba*. This decision was upheld on appeal by the District Judge of Midnapur, and from his decision the plaintiffs brought this appeal to the High Court, and the respondents filed a cross-appeal.

Dr. *Rashbehary Ghose* and Babu *Girish Chunder Chowdhury* (for Babu *Harendra Nath Mookerji*), for the appellants.

Babu *Sree Nath Das* and Babu *Sarat Chandra Ray Chowdhury*, for the respondents.

[991] Dr. *Rashbehary Ghose*.—The lower appellate Court has cut out the *mokurari* character of the lease, but it is wrong in preserving its

* Appeal from Appellate Decree No. 2269 of 1893, against the decree of J. Pratt, Esq., District Judge of Midnapore, dated the 5th of September 1893, affirming the decree of Babu Rahi Chunder Ganguli, Second Subordinate Judge of that district, dated the 30th of January 1893.

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mourasi character, which means that the lease remains a heritable one. In the case of such endowments as the present, the right of a successor-trustee is quite independent of the right of his predecessor-trustee. The predecessor has no right to bring about any change in the character of the trust property, as it originally stood, and even if he does it is in no way binding upon the trustee who succeeds him. The fact of granting a heritable lease of the endowment property is certainly tantamount to an alienation, and is prejudicial to the rights of the trustees as well as to the management of the endowment. The lease ought to be set aside and possession granted to the plaintiffs. He referred to the following cases: *Juggutmoheenee Dossee* v. *Sookeemonee Dossee* (1), *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy* (2) and *Narayan* v. *Chintaman* (3).

Babu *Sree Nath Das*, for the respondents.—Under the case-law on endowments as it at present stands I cannot question the judgment of the lower appellate Court, inasmuch as it has cut out the *mokurari* character of the grant, which may be considered an alienation of a permanent character, and at the same time likely to be injurious to the endowment. But granting a *mourasi* lease of the property, with power to increase the rent at any time can never prove injurious to the endowment, for that is nothing worse than settling tenants on the lands of the endowed property, for which legal necessity is never required to be shown. This case is specially distinguishable from other cases of alienation, as here the alienation is made, not in favour of strangers, but in favour of co-*shebaits*. Moreover, in this case the grantor of the endowment has fixed a scale for the expenses of the *debsheba*, and so long as the rents received by the plaintiffs on account of the lease furnish adequate provision for the *sheba* in proportion to the plaintiffs' *pala* according to the scale, there cannot be any reason for considering this alienation an injurious one, and when the amount of rent payable is liable to be increased at any time, the same can [992] never be inadequate for the discharge of the *sheba* of the idols. The *mourasi* character of the lease cannot then be considered an alienation injurious to the endowment, and this view has been taken in previous cases. In any case the plaintiffs cannot be granted *khas* possession. *Doorga Nath Roy* v. *Ramchunder Sen* (4), *Prosunno Kumari Debya* v. *Golabchand Baboo* (5), and *Shibessouree Debia* v. *Mothoora Nath Acharjo* (6).

The judgment of the Court (PIGOT and STEVENS, JJ.) was as follows:—

JUDGMENT.

In this case we think the appeal must succeed.

The lease granted by the ancestor of the plaintiffs to one of his co-*shebaits*, the validity of which is challenged in these proceedings, has been held to be bad, inasmuch as it was a *mokurari* lease granted without any legal necessity by the *shebait* of an endowment, the grant of which has been clearly made out. But in the judgment of the lower Court, and the decree founded upon that, the *mourasi* character of the lease has been preserved, so that the permanant character of the alienation of the property of the endowment lasts, although as to rent the character of the original lease was modified by striking out the *mokurari* provision of it, and making the lease

(1) 10 B. L. R. 19=17 W. R. 41=14 M. I. A. 289.
(2) 17 W. R. 444=11 B. L. R. 337 (note).
(3) 5. B. 393.
(4) 2 C. 341.
(5) 14 B.L.R. (450, 459)=2 I.A. 145 (151).
(6) 13 M.I.A. 270.

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liable to enhancement. But we think in allowing the validity of the lease, in so far as it gave a *mourasi* title, the Court below was in error. There are cases in which a *shebait* or manager is justified in alienating a portion of the property of the endowment; but this is not such a case, nothing of that character is made out; and we think it cannot be doubted that, in so far as this lease is a *mourasi* lease, it does amount to an alienation of the property of the endowment, and as such we think it must be held to be bad. Therefore, the lease must be declared to be bad wholly, and not merely in respect of its *mokurari* character.

Then the plaintiffs ask for *khas* possession, and as to that we have felt some difficulty upon a matter which does not clearly come out in the case before us. It appears that, long before 1240 (the year when this lease was granted) the different *shebaits* had come **[993]** to what is called a partition, the exact nature of which is not before us. We assume that it was a partition which in no way contravened, in favour of any of the parties to it, the endowment of which they were trustees, and that the rights amongst themselves of the parties to that partition were rights only of occupation, management, or custody in respect of the portion of the *debutter* land which, under that partition, each of them held in his sole hands, sole possession, sole custody [to distinguish it from title which, of course, could not spring from such an agreement]. A part of the land, which came into the custody of the plaintiffs' predecessor under this partition is the land the subject-matter of this suit, and the case of the plaintiffs is that they are entitled to *khas* possession of this land upon the lease granted by their predecessor being set aside, inasmuch as the old state of things reverts into existence as soon as the lease which changed it is put an end to. We have not got the circumstances before us sufficiently to form a judgment upon this matter, nor was it raised in such a way as to enable us to deal with it. It is very possible that, as between the plaintiffs and defendants, the plaintiffs may be in some way, so far as any right of separate custody or enjoyment of the partitioned land is concerned as between themselves and defendants, bound towards the defendants by the act of their ancestor, in so far as the interests of the endowment shall not be affected, to make good, so far as can be done consistently with those interests, possession of the land illegally conveyed by the lease: and in allowing the appeal and in setting aside the decree of the lower Court we must do so without prejudice to any right that may exist as between the plaintiffs and the defendants not in question in this suit, and arising by reason of the making of the *potta* of Baisakh 1240, in respect of the land therein leased, and in respect of the plaintiffs' right of occupation or enjoyment thereof in virtue of the partition mentioned in paragraph 2 of the plaint. As to that we say nothing, and can say nothing, and we merely refer to it in order that, so far as we can do so, we may leave such rights, if any, of the defendants in that particular, untouched by this decision, but the appeal must be allowed with costs, and the cross appeal in No. 2364 dismissed with formal costs, no pleaders' fee being allowed.

F. K. D. *Appeal allowed. Cross-appeal dismissed.*

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JULY 22.

CRIMINAL REVISION.

22 C. 994.

22 C. 994.

[994] CRIMINAL REVISION.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

PREMANUNDO SHAHA AND ANOTHER (*Petitioners*) *v.* BRINDABUN CHUNG (*Opposite Party*).*
[22nd July, 1895.]

Criminal trespass—Penal Code (Act XLV of 1860), *ss.* 441 *and* 456 *and* 509—*House breaking by night—Intent—Intrusion upon privacy.*

The accused in the middle of the night effected an entry in a room occupied by four women. On an alarm being given and an attempt made to capture him, he escaped. He was charged with an offence under s. 456 of the Penal Code. The defence set up was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the room, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal. *Held*, that the facts proved were good evidence of an intent and of an intrusion on privacy within the meaning of s. 509 of the Penal Code, and that therefore the intent to commit an offence within the meaning of s. 441 was made out. *Balmokand Ram*, v. *Ghansamram* (1) followed.

[F., 2 Cr. L. J. 279=127 P.R. 1905=18 P.R. 1905 (Cr.) ; R., 4 Cr. L.J. 293=12 P.R. 1906 (Cr.)=54 P.L.R. 1907.]

ON the night of the 17th April 1895, the complainant, Brindabun, his brother and his nephew, were asleep in the south room of his house; and his mother, his nephew's wife, his widowed sister-in law and Bidya, whom he called his wife, were asleep in the north room. At about 10 or 11 o'clock, the complainant heard cries from the room of the women, and he came out and saw the accused jump down from inside of the north room into the court-yard. He laid hold of the accused who, however, escaped. The prisoner was convicted under s. 456 of the Penal Code, and sentenced to one year's rigorous imprisonment by the Deputy Magistrate of Naraingunge. On appeal, the Sessions, Judge of Dacca, affirmed the conviction, but reduced the sentence to five months' imprisonment.

[995] Mr. *M. Ghose* appeared on behalf of the prisoner in support of the rule.

The Officiating Legal Remembrancer (Mr. *P. L. Roy*), for the Crown.

Mr. *M. Ghose.*—In order to justify the conviction, it must appear that the prisoner entered into the room with the intent to commit an offence, *i.e.*, something made punishable by the Penal Code. If he entered the room for the purpose of carrying on an intrigue with Bidya, that would not be an offence, inasmuch as she is not the married wife of the complainant, nor would it be an offence in the case of Bidya's sister, who is a widow. See *In the matter of the petition of Shib Nath Banerjee* (2). *In the matter of the petition of Punjab Singh* (3), and Criminal Revision Case No. 301 of 1882 (4).

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* Criminal Revision No. 346 of 1895, against the order passed by Babu Gopendro Krishna Deb, Sessions Judge of Dacca, dated the 31st of May 1895, modifying the order passed by L. T. R. Lucas, Esq., Deputy Magistrate of Naraingunge, dated the 13th of May 1895.

(1) 22 C. 391. (2) 24 W.R. Cr. 58. (3) 6 C. 579. (4) Weir 323.

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The *Officiating Legal Remembrancer*.—In the lower Court the defence set up was one of *alibi* which was disbelieved. Here a new line of defence has been adopted. There is no evidence that any one of the four women invited the prisoner to enter the room, and the fact of the four women sleeping together precludes the possibility of such a supposition. If, therefore, the petitioner entered the room occupied by these women without invitation, he intruded upon their privacy, and that is an offence under s. 509 of the Penal Code. Aspersions have been cast upon the character of these women at random without any evidence at all. If attacks are made upon the character of any person they must be justified by good and substantial evidence in the same manner as any charge of an offence against a person has to be proved. Under the circumstances of the case, it is clear that the entry was effected with intent to commit an offence within the meaning of s. 441 of the Penal Code. See *Koylash Chandra Chakravarty* v. *Queen-Empress* (1), and *Balmakand Ram* v. *Ghansamram* (2) and Criminal Revision Case No. 114 of 1881 (3).

The judgment of the High Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

[996] The prisoner has been convicted under s. 456 of the Indian Penal Code, and we are asked, in revision, to set aside the conviction as bad in law.

The complainant, Brindabun, is a labourer living at Musdail. The accused is a shop-keeper belonging to the same place. Brindabun's *bari* consists of two rooms, a north and south house or room. On the night of the 17th April 1895, Brindabun, his nephew and his brother slept in the south house. His mother, Bidya his wife [or who passes as such], his nephew's wife and his sister-in-law slept in the north house. About 10 or 11, the complainant heard cries from his mother from the women's room; the other women also screamed out. Complainant came out and saw the prisoner jump down from the inside of the north house, ran up, and seized him.

It is not necessary to recite the other facts upon which it has been found that the prisoner had got into the women's room on this occasion. His defence was that he had not gone there: that has been disbelieved, and is out of the case.

The prisoner's case has, of course, been presented to us without any dispute as to the findings of fact come to by the lower Courts; but it is contended that no offence is proved against him on the findings and on the evidence.

The defence made by the prisoner in the lower Courts being simply that he was not in the room at all, there was no attempt to explain his presence there, as to which there is no doubt.

The suggestion made on his behalf before us is that he must have gone to the room to carry on an intrigue with one of the women there; that if the woman he sought was Bidya no offence against the law was contemplated by him, inasmuch as, although she calls herself and passes as complainant's wife, it appears that she is not really his wife, but the widow of one Megha. It must appear to justify the conviction that prisoner entered into the room with intent to commit an offence; that is,

(1) 16 657. (2) 22 C. 391. (3) Weir 327.

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something made punishable by the Penal Code: but an intrigue with Bidya would not be an offence, as she is not a wife. Another of the young women, who was in the room, Bidya's sister, is also, it appears, a widow; and if prisoner went there to visit her, that would not be an offence against the law. Therefore, the intent of the prisoner [997] may have been to do that which is not an offence under the law; and that being so, he is not proved to have committed criminal trespass.

It is said that there is evidence from which the conclusion must be drawn that the prisoner must have got into the room with the assistance of some of the persons inside; and that this shows that he went there to carry on such an intrigue as is suggested.

The women, according to the evidence, went to bed between seven and eight. The old woman says she shut the door. Bidya says, they were all "sleeping in the north house after having shut the door with a latch," which, no doubt, means a bolt. She says "the door was shut from the inside."

There was no evidence showing any injury to the door or the fastenings of it, and Lakapati said that, after her son went to the *thana*, she shut the door again; the inference is, therefore, that it was not injured by having been violently broken open.

Now there is no evidence whatever against the character of any of the women, except, no doubt, as to Bidya, that she passes as a wife, without having been actually married.

There is no proof that the door was so fastened that it could only have been opened by some one inside the room. There is no evidence as to the structure of the bolt and its fastenings, or whether it could not have been moved or removed from outside by some contrivance, without breaking open the door. Indeed, there is no evidence that Lakapati did securely fasten the door when they all went to bed. There is nothing to show that between that time and 10 or 11, the door may not have been opened for some perfectly innocent purpose by some of the women, while the fact of there being four women in the room would render the supposition that some one of them admitted the accused into it for the purpose suggested in the argument a highly improbable one.

The point must be dealt with in some measure in the same manner as it would be were it used in support of the commission of an offence, for it amounts to trying the character of some one or other of the young women upon such evidence as has been referred to. They are people of humble position, but that cannot [998] make the question of less importance, or change the conditions under which it is to be judged.

We think the facts do not justify the conclusion that any of the inmates of the room admitted the prisoner for the purpose suggested, or at all. We are not entitled either to find or to presume that the prisoner went to the room that night to visit a willing mistress.

The case, therefore, comes to this that, late at night when the women were in bed (in one bed as is stated), the prisoner, a stranger, though a neighbour, went into the room where they were sleeping; that his position and all the facts preclude any motion of his going there to steal or for any purpose save his own pleasure. We think the facts are good evidence of an intent and of an intrusion on privacy within the meaning of s. 509 of the Indian Penal Code; and that, therefore, the intent to commit an offence within the meaning of s. 441 is made out.

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We follow the ruling in *Balmakand Ram* v. *Ghansamram* (1). We may observe that that ruling exactly coincides with the Criminal Revision Case No. 114 of 1881 before Turner, C.J., and Kindersley, J. (2).

We discharge the rule as to the setting aside of the conviction.

But we think 3 (three) months' rigorous imprisonment will be a sufficient sentence; and we reduce the sentence to that amount.

S. C. B. *Conviction upheld, sentence reduced.*

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22 C. 998.

CRIMINAL REVISION.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

KESHAB CHUNDER ROY (*Petitioner*) *v.* AKHIL METEY (*Opposite Party*).* [30th July, 1895.]

Revision—Criminal Procedure Code (*Act X of* 1882), s. 439—*Power of Court on revision—Revision on facts.*

The interference of the High Court in revision is not limited to matters of law; it is fully competent to this Court to enter into matters of fact if it thinks fit. But the mere application of a party to examine the evidence [999] in any case would not be a sufficient ground for doing so. There must appear on the face of the judgment or order complained of, or of the record, some ground to induce the High Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. But no hard and fast rule can be laid down; each case will have to be dealt with according to its own circumstances.

[F., 157 P. L. R. 1908 = 22 P. W. R. 1908 (Cr.); 9 Cr. L. J. 211 = 1 Ind. Cas. 238 = 5 N. L. R. 4; 26 M.L. J. 160 = 1914 M. W. N. 273 = 15 Cr. L. J. 236 = 23 Ind. Cas. 188; 23 Ind. Cas. 493 = 15 Cr. L. J. 285; R., 28 B. 533 (549); 33 C. 295 = 2 C. L. J. 516 (520); 2 C. L. J. 101 (102).]

THE story of the prosecution as told by the complainant was that one Rajani Bagdi, who held a decree against the petitioner Keshab Roy, went with a Civil Court peon to the house of the petitioner to attach some moveable property in execution of his decree; that after the attachment had been made an altercation took place between the peon and one Bhobotaron, whereupon the petitioner chased the peon with a *banti* (fish knife), and on the complainant Akhil's intervening to save the peon he, Akhil, was hurt in the hand by the petitioner Keshab Roy.

The case for the defence was that there was bitter ill-feeling between Sham Chand Roy, to whose party Rajani Bagdi and the complainant Akhil belong, and Loke Nath Roy, to whose party the petitioner's brother Purna belongs; that Purna having refused to join Sham Chand's party, Sham Chand, with a large band of servants and dependants, among whom was the complainant Akhil, went to *loot* Purna's house; that while Akhil was attempting to snatch an ornament from the arm of Purna's wife, Purna struck him with a *banti* (fish knife) and that Keshab, the petitioner, had no interest in the house of Purna, nor was he present at the occurrence. The Deputy Magistrate believed the case for the

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* Criminal Revision No. 332 of 1895, against the order passed by B. C. Seal, Esq., Sessions Judge of Burdwan, dated the 3rd June 1895, confirming order passed by Babu Promoda Nath Mukerjee, Deputy Magistrate of Burdwan, dated the 16th of May 1895.

(1) 22 C. 391. (2) Weir. 327.

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prosecution to be true, and convicted the petitioner under s. 326 of the Penal Code, and sentenced him to be rigorously imprisoned for four months. In appeal the Sessions Judge upheld the conviction and confirmed the sentence. From his judgment it appears that there was a counter-case by Purna, complaining of the *loot* which had come up before him in appeal and which he had disbelieved. The petitioner obtained a rule in the High Court.

Mr. *R. Allen* and Babu *Boidya Nath Dutt* appeared for the petitioner in support of the rule.

The Junior Government Pleader (Babu *Ram Churn Mitter*) appeared for the Crown.

Mr. *Allen*.—The decision of the Sessions Judge in this case **[1000]** was largely influenced by his judgment in appeal in the counter-case brought by Purna. His judgment was not founded upon the evidence adduced in the case before him. Material evidence has been overlooked and no weight given to it. The circumstances of this case are such that this Court as a Court of Revision should permit the facts to be gone into. It is admitted that generally this Court as a Court of Revision declines to go into questions of fact, but there are authorities which establish that this Court has the power to do so, and that this power should be exercised in the interests of justice when the occasion arises, in order to prevent a failure of justice. See *Nobin Krishna Mookerjee* v. *Russick Lall Laha* (1), *Reid* v. *Richardson* (2), *Queen-Empress* v. *Shekh Saheb Badrudin* (3), *Bhawoo Jivaji* v. *Mulji Dayal* (4) and *Queen-Empress* v. *Chagan Dayaram* (5).

Babu *Ram Churn Mitter*, for the Crown.—This Court as a Court of Revision ought not to go into the questions of fact. The Court has the power to do so, but it is a discretionary power, and should not be exercised except under exceptional circumstances. There is nothing peculiar in this case to call for the exercise of this discretionary power.

Mr. *Allen* was permitted to read and comment on the evidence in the case.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The petitioner Keshab Chunder Roy has been convicted by the Deputy Magistrate of Burdwan of the offence of causing grievous hurt to one Akhil Metey by a dangerous weapon and sentenced to rigorous imprisonment for four months, and the learned Sessions Judge having dismissed his appeal, he now asks us, under s. 439 of the Code of Criminal Procedure, to set aside the conviction and sentence on two grounds:

First, that the learned Sessions Judge, in dismissing the petitioner's appeal, was greatly influenced by his judgment in the counter-case which was no evidence in this case; and that this error has caused a failure of justice.

[1001] *Second*, that the finding of the Courts below is so completely against the weight of evidence that it ought to be set aside.

As both these two grounds depend for their success upon its being shewn that the conviction is not warranted by the evidence, and as there

(1) 10 C. 1047. (2) 14 C. 361. (3) 8 B. 197.
(4) 12 B. 377. (5) 14 B. 331.

was some discussion during the argument as to the propriety of our examining the evidence in revision, we deem it desirable at the outset shortly to state our view of the law on the subject.

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Section 439 of the Criminal Procedure Code provides that the High Court in revision may (subject to certain limitations not necessary now to be dwelt upon) in its discretion exercise any of the powers conferred on a Court of appeal. The interference of the High Court in revision is not therefore limited to matters of law; but it is fully competent to this Court to enter into matters of fact if it thinks fit. On the other hand, it is not bound to go into evidence if it does not think fit, and the question is where should it exercise this discretionary power and where not. Clearly the mere application of a party to examine the evidence in any case would not be a sufficient ground for doing so. Section 440, which makes it optional with the Court in revision to hear parties or their pleaders, renders this quite clear. Indeed, were it otherwise, there would virtually be a second appeal on facts in every case in which the parties came up to this Court. This we do not think the Legislature could have intended. There must appear upon the face of the judgment or order complained of or of the record some ground (which need not always be a ground of law) to induce this Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. Where there is no such ground, the practice has been to limit the interference in revision to matters of law. See *Nobin Krishna Mookerjee* v. *Russick Lall Laha* (1), *Reid* v. *Richardson* (2), *Queen-Empress* v. *Shekh Saheb Badrudin* (3), *Bhawoo Jivaji* v. *Mulji Dayal* (4), *Queen-Empress* v. *Chagan Dayaram* (5). In making these observations, which are only intended to indicate generally the circumstances under which this Court in revision will enter into questions **[1002]** of fact, we must not be understood as laying down any hard and fast rule for regulating its discretionary power in this respect. It is neither easy nor desirable to lay down any such rule, and each case will have to be dealt with according to its own circumstances.

This being premised, let us examine the grounds urged in this case. In support of the first ground, the learned Counsel for the petitioner referred to the following portions of the judgment of the learned Sessions Judge as shewing that he was influenced in his decision by his judgment in the counter-case.

After stating some of the facts of the case, the learned Sessions Judge observes: "Thus there were the two counter-cases, one by Purna complaining of the *loot* and the other by Akhil Metey complaining of the hurt. The case of Purna came up before me in appeal, and I disbelieved the case set up by him, and found that the occurrence had taken place in connection with the execution of the writ of attachment issued at the instance of the decree holder, Rajani Bagdi. A copy of that judgment is with the record. The evidence for the prosecution in Purna's case is, generally speaking, the evidence for the defence in this case." He then adds: "When considering the application for bail in this case I made the following observations: "The facts connected with the occurrence relating to this case were considered by me in another case. It is therefore that I have patiently heard the learned pleader to see if there are grounds

(1) 10 C. 1047. (2) 14 C. 361. (3) 8 B. 197.
(4) 12 B. 377. (5) 14 B. 331.

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for changing the view that I then took." And a little further on he says: "Though the judgment in the previous case is no evidence in this, some of the arguments on which that judgment is based apply to the facts of this." And when commenting adversely on the evidence for the defence, he observes: "The best witness to prove such a fact was the woman herself, but she has not been examined. It is not out of the scrupulous regard for the female members that she has been kept back. In the previous case it has been pointed out that her evidence was damaging to the case set up by Keshab, and that the evidence of the mother of Keshab went to a certain extent to support the case of Akhil and both of them have been kept back in this case."

These remarks of the learned Sessions Judge clearly show that, though he says that the judgment in the former case was no **[1003]** evidence in this, he was influenced in his decision in this case by that judgment. He seems to have heard this case (to use his own words) to see if there are grounds for changing the view he took in the counter-case, when he ought to have heard it quite irrespective of that view, and with reference to the evidence adduced in it. He appears to have been under the misapprehension that because "the evidence for the prosecution in Purna's case (that is the counter-case) is generally speaking the evidence for the defence in this case," the failure of the prosecution in the former case must lead, not only to the failure of the defence in this case, but also to the success of the present prosecution when he should have borne in mind that it was quite possible for both the two prosecutions to fail by reason of the cases set up being both false.

The judgment of the appellate Court is thus vitiated by a clear error, and the question is, how far that error has affected the decision on the merits. This brings us to the second point raised on behalf of the petitioner and renders it necessary for us to examine the evidence for ourselves.

Upon a careful examination of the evidence, and after attaching all due weight to the opinions of the Court below, the conclusion we arrive at is that the evidence does not warrant the conviction of the petitioner. The Courts below seem to have scrutinized the evidence for the defence more narrowly than that for the prosecution; whereas we need hardly add it is only when the evidence for the prosecution stands examination that it becomes necessary to consider the evidence for the defence.

The story of the prosecution as told by the complainant in his deposition in this case is, that the witness Rajani Bagdi, who held a decree against the accused Keshab Roy, went with a Civil Court peon to the house of the accused to attach some moveable property in execution of his decree; that after the attachment had been made, an altercation took place between the peon and one Bhobotoram, whereupon the accused chased the peon with a *banti* or fish knife, and on the complainant Akhil's intervening to save the peon, he, Akhil, was hurt in the hand by Keshab. The case for the defence is, that there is bitter ill-feeling between **[1004]** Sham Chand Roy, the master of Rajani Bagdi, and of Akhil Metey and Loke Nath Roy, to whose party Keshab's brother Purna belongs; that Purna having refused to join Sham Chand's party, Sham Chand with a large band of servants and dependants, among whom was the complainant Akhil, went to *loot* Purna's house; that while Akhil was attempting to snatch an ornament from the arm of Purna's wife, Purna struck him with a *banti* and that Keshab had no interest in the house of Purna,

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nor was he present at the occurrence. [Their Lordships after dealing with the evidence in the case continued.]

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Weighing, therefore, the evidence for the defence against that adduced for the prosecution, and bearing in mind the material discrepancies in the evidence for the prosecution, we must say that the evidence does not warrant the conviction of Keshab Chunder Roy, and that it would be wrong to allow the conviction to stand.

The result is that the conviction and sentence must be set aside and the petitioner acquitted and released.

S. C. B. *Conviction set aside*

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22 C. 1004.

CRIMINAL REVISION.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

AKHIL CHANDRA SEN AND ANOTHER (*Petitioners*) v. THE QUEEN-EMPRESS (*Opposite Party*).* [25th June, 1895.]

Commitment—Criminal Procedure Code (Act X of 1882), ss. 195, 478—*Forged documents filed in Court—Order of commitment for trial—" Any such offence " in s.* 478, *meaning of.*

Certain documents were filed annexed to a petition in a suit pending before a Munsif, but were not given in evidence. The Munsif on suspicion that they had been tampered withheld an enquiry and committed the petitioners for trial by the Court of Session. *Held*, that it was a proper commitment under s. 478 of the Criminal Procedure Code.

The words "any such offence" in that section means an offence referred to in s. 195 of the Code, and not an offence referred to in that section qualified by the circumstances under which it is committed.

[**R.**, 15 C.W.N. 565=12 Cr.L J. 101=9 Ind. Cas. 577 ; 13 Cr.L.J. 19=13 Ind. Cas. 211=(1911) 2 M.W.N. 526 ; **D.**, 37 C. 250 (254)=10 C.L.J. 564=14 C.W.N. 330=11 Cr.L.J. 37=4 Ind. Cas. 710.]

[1005] THE accused No. 1, Akhil Chandra Sen, brought a suit against one Boloram for the recovery of a certain sum of money held in deposit at the Collectorate. Subsequently he applied to amend his plaint by a verified petition, and annexed to it some documents. A few days after it was brought to the notice of the Court that the said documents had been tampered with. On examining those documents the Munsif suspected that they had been tampered with. Thereupon he himself held an enquiry under s. 478 of the Criminal Procedure Code, and came to the conclusion that the accused No. 1 should be committed to take his trial before the Court of Session for offences under ss. 467 and 471 and other sections of the Penal Code and accused No. 2 for abetting those offences.

Mr. *Henderson* (with Mr. *Percival*) appeared for the petitioners.

Mr. *Henderson* :—The Munsif had no jurisdiction to commit the accused under s. 478 of the Criminal Procedure Code. The words "any such offence" in that section mean one of the several offences referred to in s. 195 of the Code, and in the case of any of the offences mentioned

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* Criminal Revision No. 362 of 1895, against the order passed by Babu Mohendra Lal Das, Additional Munsif of Chittagong, dated the 21st of May, 1895.

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in cl. (*c*), *viz.*, an offence described in s. 463, or punishable under s. 471, s. 475, and s. 476 of the Indian Penal Code, it must also be committed by a party to any proceeding in any Court in respect of a *document given in evidence* in such proceeding. See *Abdul Kader* v. *Meera Saheb* (1). Here the documents in question were filed in a suit pending before the Munsif, and were not given in evidence.

The judgment of the High Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

We can only quash this commitment on a point of law. The petitioner has been committed by a Munsif to the Sessions Court at Chittagong on charges under ss. 467 and 471, as well as other sections of the Penal Code. It is contended that, under s. 478 of the Criminal Procedure Code, the Munsif had no jurisdiction to make the commitment, because the offence charged, though referred to in s. 195 of the Code, was not an offence **[1006]** described in cl. (*c*) of that section. The words "any such offence" in s. 478 mean an offence referred to in s. 195 and not (in the case of the offences mentioned in cl. (*c*), s. 195) an offence referred to in that section qualified by the circumstances under which it is committed, *i.e.*, committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding, as described in cl. (*c*) of the section. We have no doubt that the former is the right construction, and that the offences referred to in s. 478 of the Code of Criminal Procedure are the offences mentioned in s. 195. If the latter construction is correct it is difficult to give any meaning to the words in s. 478. * * * "or brought under the notice of any Civil or Criminal Court in the course of a judicial proceeding."

It appears that in the present case the document, which has been made the subject of the charge, was filed in a Civil suit pending before the Munsif, and was intended to be used as evidence in that suit, although it may not have been actually put in evidence, and the offence which is said to have been committed in respect of it was brought under his notice in the course of a judicial proceeding. We think, therefore, that there is no point of law on which we can quash the commitment. The application must, therefore, be rejected.

S. C. B. *Rule discharged.*

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22 C. 1006.

CRIMINAL REVISION.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

QUEEN-EMPRESS *v.* SITANATH MANDAL (*Accused*).*
[16th July, 1895.]

Criminal Procedure Code (Act X of 1882*), s.* 238 *and s.* 307—"*Minor offence," conviction of, without formal charge—Penal Code (Act XLV of* 1860*), ss.* 365, 366, 376.

An offence under s. 365 of the Penal Code is, within the meaing of s. 238 of the Criminal Procedure Code, a minor offence as compared with offences under

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* Criminal Reference No. 15 of 1895, made by F.F. Handley, Esq., Additional Sessions Judge of 24-Pergunnahs, dated the 8th June 1895.

(1) 15 M. 224.

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s. 366 and s. 376 of the Penal Code; and the High Court in dealing with a case under s. 307 of the Criminal Procedure Code can convict an accused of the former offence without a formal charge having been framed.

[1007] *Per* BANERJEE, J.—The words "minor offence" have not been defined by law; they are to be taken not in any technical sense, but in their ordinary sense.

THE case of the prosecutrix was that she made a complaint on the 4th of January 1895 to the Magistrate at Alipur against the accused of house-trespass and indecent assault. On her way from Alipur she was waylaid and abducted and raped by the accused and others. She was kept in wrongful confinement after that abduction for thirteen days. Her relatives laid a complaint of wrongful confinement under s. 342 of the Penal Code before the Police. When the woman was rescued, she made a complaint of rape and abduction. The Deputy Magistrate, who tried the complaint under s. 342, sentenced the prisoner to six weeks' imprisonment. No notice seems to have been taken of the complaint of rape and abduction.

On appeal the conviction was set aside, and the Deputy Magistrate ordered to commit the case to the Sessions, as his findings on the evidence were of acts amounting to abduction and rape. The case was then tried by the Additional Sessions Judge of Alipur with a jury on charges under s. 366 and s. 376 of the Penal Code. The jury returned a verdict of not guilty on both the charges, and the Judge differing from that verdict submitted the case for the orders of the High Court under s. 307 of the Criminal Procedure Code.

Babu *Roop Nath Bannerji* appeared for the prisoner.

The Officiating Deputy Legal Remembrancer (Mr. *P. L. Roy*) appeared on behalf of the Crown in support of the reference.

The *Officiating Deputy Legal Remembrancer.*—I do not contend that the evidence on the record justifies a conviction under s. 366 or s. 376 of the Penal Code. But there is sufficient evidence for conviction for the minor offence under s. 365. And s. 238 of the Criminal Procedure Code provides that, when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. The High Court in dealing with a case under s. 307 may exercise the power conferred by s. 238. See *Jatra Shekh* v. *Reazat Shekh*(1), *Empress* v. *Harai Mirdha*(2), and *Government of Bengal* v. *Mahaddi*(3).

[1008] The following judgments were delivered by the High Court (MACPHERSON and BANERJEE, JJ.):—

JUDGMENTS.

MACPHERSON, J.—We are unable to accept the case for the prosecution, in so far as it is attempted to be made out that the complainant was raped by Sitanath or by anybody else, or that she was abducted in order to compel her to have illicit intercourse with him, or any one against her will. The woman's own conduct and the conduct of Sitanath and of others, who were accused with him, is inconsistent with any such treatment, or with any such intention on their part. If the woman had been raped or subjected to great personal violence or indignity, it is impossible to suppose that she would not have complained to one or other of the persons whom

(1) 20 C. 483. (2) 3 C. 189. (3) 5 C. 871,

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she must have met when she was brought within the precincts of the Alipur Court with a view to the settlement of the criminal case which she had brought before she was forcibly carried off. But although the complainant's statement is doubtless greatly exaggerated as to the treatment which she had received, we have no doubt that the fact of the abduction is true, and that she was, when returning from the Magistrate's Court where she had gone with Isser Haldar to lay her complaint, seized and carried off and kept in confinement. There is ample evidence to establish this, and we see no reason to doubt its truthfulness. But the object of the outrage was, we consider, not to violate the complainant's person, but to prevent her from prosecuting the complaint which she had made, to bring her under the influence of the person who had abducted her and to keep her away from the influence of those who might compel her to go on with the complaint, and for that purpose it was necessary to keep her in confinement. We think, therefore, that the jury were right in acquitting the prisoner in respect of the charges under ss. 366 and 376. But the evidence does, in our opinion, establish the commission of an offence under s. 365. There was no formal charge under that section, but in dealing with the case we can exercise all the powers which we could exercise on an appeal; and we think that the offence is, within the meaning of s. 238 of the Code of Criminal Procedure, a minor offence, and that the accused could have been convicted of it without a formal charge. It is true that wrongful confinement is not an essential feature of the commission of an **[1009]** offence under s. 366, but it must often be involved in it, and the whole case for the prosecution is not only that there was abduction but confinement with the view to force the complainant to illicit intercourse. That particular intention is the part of the case which we do not think is well established.

The prisoner is not, in our opinion, prejudiced by the omission to frame a charge under s. 365. It was necessary, to secure a conviction under that section, to prove abduction as well as secret confinement. The fact that there was such confinement has been proved throughout the case for the prosecution, but it was said to be for a purpose which we do not find to be properly established.

I would only add that, in the conduct of the woman herself and in the conduct of the prisoner, there is much to indicate that the object was that which we have found and not to violate her person. We convict the prisoner of an offence under s. 365 of the Indian Penal Code, and sentence him to rigorous imprisonment for one year.

BANERJEE, J.—I concur with my learned colleague in thinking that the charges under ss. 366 and 376 of the Indian Penal Code have not been established by the evidence, and that the jury were right in acquitting the prisoner of the offences punishable under those sections.

I also concur with my learned colleague in thinking that the evidence establishes the fact that complainant was abducted by the accused with the object, not of having illicit intercourse with her, but of keeping her away from the influence of those persons who had induced her to complain against the accused, and for the purpose also of making her compromise the criminal case that she had already instituted. Upon the facts proved, the offence of the accused is one that is punishable under s. 365 of the Penal Code, and the question is whether, though no charge was framed under that section, it is competent to this Court, in dealing with the case under s. 307 of the Code of Criminal Procedure, to convict the accused of that offence. Section 307 provides

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that, in dealing with a case submitted by the Sessions Judge under that section, "the High Court may exercise any of the powers which it may [1010] exercise on an appeal; but it may acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it." And the question, therefore, is reduced to this, namely, whether the jury could, upon the charges framed, have convicted the accused of an offence under s. 365 of the Penal Code. Now s. 238 of the Code of Criminal Procedure, paragraph 2, says: "When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it." So that if an offence punishable under s. 365 of the Penal Code can be properly regarded as a "minor offence" compared with that punishable under s. 366, then clearly under s. 238 of the Criminal Procedure Code the jury could have convicted the accused of an offence under s. 365, though he was not charged under that section. What is to be regarded as a minor offence compared with another has not been defined by law, and I think we may take the words "minor offence" in their ordinary sense; and if these words are taken in their ordinary sense, the offence under s. 365 would be a minor offence as compared with that punishable under s. 366, which is certainly of a graver description. They are both offences of abduction, but in the one case the motive for the abduction is not so heinous as in the other. In the case of *Jatra Shekh* v. *Reazat Shekh* (1) an offence punishable under s. 498 of the Penal Code was regarded as a minor offence compared with an offence punishable under s. 366.

I do not say that I am prepared to go so far as that case goes, but I cite that case as shewing that the words "minor offence" are to be taken, not in any technical sense, but in their ordinary sense. That being so, I think that it is competent to this Court, in dealing with the case under s. 307 of the Criminal Procedure Code, to convict the accused of an offence under s. 365 of the Penal Code, although he was not charged with any such offence, but was charged with an offence punishable under s. 366.

I may add that two other cases cited in the argument also lend [1011] support to the view we take. These are the cases of the *Empress* v. *Harai Mirdha* (2), and *Government of Bengal* v. *Mahaddi* (3).

I agree in convicting the accused under s. 365 of the Penal Code, and in sentencing him to one year's rigorous imprisonment under that section.

S. C. B.

(1) 20 C. 483. (2) 3 C. 189. (3) 5 C. 871.

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PRIVY COUNCIL.

PRESENT:

Lords Watson and Davey and Sir R. Couch.

[On petition relating to an Order of Her Majesty in Council on an appeal from the High Court at Calcutta.]

IN THE MATTER OF THE PETITION OF PREM LALL MULLICK.
THE ADMINISTRATOR-GENERAL OF BENGAL (*one of the Defendants*) *v.* PREM LALL MULLICK (*Plaintiff*) (1). [5th and 7th August, 1895.]

Appeal to Privy Council—Effect of order of Privy Council dismissing suit—Power of High Court to make orders in suit—Petition for the amendment of an Order in Council dismissing a suit—Receiver's liability to account—Rights as between the Administrator-General and Executors transferring estate to him (s. 31, *Act II of* 1874), *and the petitioner interested in that estate.*

A Court, having appointed a Receiver in a suit, has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending. The estate is in its hands, and the Receiver is its officer, and the dismissal of the suit by an Appellate Court does not alter that state of things. The original Court in such a case may permit parties interested to intervene on questions as to the accounts, and may deal with costs and other matters.

In a suit, by a plaintiff interested in the estate, wholly based on the alleged illegality of its transfer, by the executors named in the will of a Hindu, to the Administrator-General (Act II of 1874, s. 31), decrees were made by the High Court, Original and Appellate, in the plaintiff's favour. The Judicial Committee, however, held the transfer legal; and the suit, brought against the Administrator-General and the executors as co-defendants, was dismissed.

Held, on the plaintiff's petition for such modification of the order dismissing the suit as would maintain what had been ordered below relating to the accounts, thereby enabling the High Court to bring matters in dispute to an end, that there were no grounds for the amendment.

[1012] Their Lordships' opinion was that the High Court would not be deprived of any jurisdiction in that respect by the dismissal of the suit. If it should be necessary to the carrying out of the transfer that the Administrator-General should take proceedings, he could do so. To make orders upon the Court's Receiver was within its powers; and either the Receiver or the executors could be called to further account, without the petitioner being met by the defence of prior adjudication of the matter (s. 13 of the Code of Civil Procedure).

PETITION for the amendment of an order in Council (11th May 1895), which gave effect to a judgment (30th March 1895) of the Judicial Committee.

The order in council above mentioned dismissed a suit, in which the present petitioner was plaintiff, *viz.*, *Prem Lall Mullick* v. *The Administrator-General of Bengal* (2), and that order, giving effect to the Committee's judgment delivered on the 30th March 1895(1), reversed two decrees, one made by the Court of first instance on the 21st December 1893 and the other affirming it on appeal on the 16th March 1894. The original decree granted an injunction restraining the Administrator-General from receiving, by transfer from the executors named in the will of the late Nundo Lall Mullick, the estate of the testator, both the Courts below holding s. 31 of the Administrator-General's Act II of 1879 to be inapplicable to the estate of a Hindu testator. The same decree directed that the executors

(1) 22 C. 788 = 22 I. A. 107.

(2) 21 C. 732 = 22 C. 788.

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should account, and upon a further application the Court appointed a Receiver of the estate.

The object of the present petition, filed on the 30th July 1895, is stated in their Lordships' opinion.

The principal question now raised was whether the order in Council of the 11th May would not, unless it should be amended, deprive the High Court of authority to deal fully with the accounts as between the petitioner, or the Administrator-General, on the one hand, and the executors on the other. The latter had been made co-defendants with the Administrator-General in the suit now dismissed, having been charged in that suit with having failed to account properly for some of the estate. The petition set forth [1013] that after the High Court's judgment, which was given on the 16th March 1894, the Court of first instance had made a series of orders, beginning on the 7th May 1894, connected with the administration of the testator's estate. On the 28th June 1894 the Receiver was ordered to pay certain expenses out of the estate, and the maintenance of the petitioner and his mother. On the 20th August 1894 the executors were ordered to file accounts—an order which the surviving executor and the representatives of the other who had died obeyed. On the 11th December 1894 claims against the estate were filed. On the 20th May 1895 the Receiver was ordered to pay expenses of repairs on the estate. These matters had not been brought to the notice of the Committee, not appearing in the record of the appeal, which went no further than down to the decree of the High Court on the above date.

Mr. *J. H. A. Branson*, appeared for the petitioner.

Mr. *A. Phillips*, for the Administrator-General.

In outline, the reasons for this application were that, as the suit had been dismissed by the order in Council of the 11th May, without provision made for the completion of the proceedings already commenced in regard to the accounts as against the executors, difficulties might, and probably would, arise. That order might be amended by its being restricted to the decision that the transfer to the Administrator-General was legal, under s. 31 of Act II of 1874; and the accounts against the executors might remain, and be wound up. The High Court in addition to having appointed a Receiver of the estate had ordered that accounts should be brought in; and these were material to the charge made in the suit against the executors named in the will, that they had not properly accounted for all the testator's estate. It would probably be understood, if the order of the 11th May remained as it was, that the steps taken in the High Court were annulled, although it was true that the Receiver would not be discharged till his accounts had been passed. It would appear that neither in the suit now dismissed, for it was at an end, nor in a new suit, which might be met by a defence of *res judicata*, could the inquiry go on. No doubt, the Receiver, as the Court's own officer, would remain subject to its orders. But, as [1014] against the executors, the further proceedings would rest with the Administrator-General, who might not be in a position to proceed.

There also were the costs incurred in India after the appeal had been disposed of by the order in question. An intimation of their Lordships' opinion that the result would not be to deprive the High Court of any jurisdiction, which, in the absence of the order of the 11th of May, it would have possessed in regard to the accounts and the costs relating thereto, would be enough. To enable the High Court to effectively conclude the case was all that was required.

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Mr. *A. Phillips* was heard for the Administrator-General, who, he stated, would be quite content with any expression of opinion that their Lordships might think proper to give. The High Court had full power over its Receiver.

LORD WATSON said that their Lordships would afterwards express their opinion. This opinion he read on the 7th August:—

OPINION.

LORD WATSON.—This is a petition by Prem Lall Mullick for the amendment of an order of Her Majesty in Council, dated the 30th March 1895, reversing two decrees of the High Court of Calcutta, pronounced in its Appellate and in its Ordinary Original Civil Jurisdiction, in a suit brought by the petitioner against the Administrator-General of Bengal and against two persons appointed to be the executors of his will by the petitioner's father, the late Nundo Lall Mullick, and also dismissing the suit with costs in the Courts below to the petitioner and to the Administrator-General, as between solicitor and client, out of the estate of the testator.

The executors nominated by the testator accepted and retained office for two years and a half after his death, when they executed a transfer of the estate and its management to the Administrator-General, bearing to be in pursuance of the provisions of "The Administrator-General's Act, 1874" (Act No. II of 1874). By the terms of the will the executors were directed to hold the estate in trust for the petitioner, on his attaining majority, subject to the life-interest of the testator's widow. The petitioner's suit was wholly based on the alleged illegality of the transfer by the executors to the Administrator-General. His plaint contained a variety of conclusions, these being: (1) for the appointment **[1015]** of a Receiver; (2) for an injunction to restrain the Administrator-General from interfering with the estate or its management; (3) for removal of the executors-nominate, and the appointment of new executors or trustees, and a judicial scheme for their administration; (4) for an account of the dealings of the executors-nominate with the estate; and (5) to have the maintenance payable to the petitioner and his mother fixed by the Court.

In support of this application, Counsel for the petitioner represented that, in consequence of the dismissal of the suit, the Court below will be deprived of jurisdiction to entertain and dispose of various points of controversy in and connected with it; and also that he will be seriously prejudiced, as in a question with the defendants, the executors-nominate of the testator, whom he charges in his plaint with malversation in their office. It appeared from the statement of Counsel that questions may or will arise upon the accounts of the Receiver appointed by the Judge of first instance during the dependence of the suit, who must now in consequence of Her Majesty's order transfer the balance in his hands to the Administrator-General; and that the petitioner is apprehensive that, in the event of a new action for accounts being brought against the executors-nominate, the dismissal of the suit may afford them a good defence of *res judicata*. It was accordingly suggested that the order in Council ought to be amended, by limiting its scope to the single question touching the legality of the transfer to the Administrator-General, and leaving all other questions raised in the plaint to be dealt with by the Court below in the course of the suit.

Their Lordships are very clearly of opinion that neither of the reasons advanced by the petitioner for modifying the order in Council is well founded.

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As to the first of these reasons, although a Receiver has been appointed, who now holds and administers the estate of the testator, he is merely the officer of the Court, and the estate must, for all legal purposes, be regarded as being in *manibus curiæ*. It appears to their Lordships to be extravagant to suggest that the Court has not ample jurisdiction, without the aid of a **[1016]** pending process, to require accounts from their own officer, to permit parties interested to intervene in the examination of these accounts, to make just allowances to their officer for his administration, and to deal with all questions of costs connected with the investigation of his accounts as between him and any parties interested who may be allowed to appear and take part in it.

In regard to the insufficiency of the second reason, their Lordships entertain as little doubt. The conclusions for accounting, which are directed, not against the Administrator-General, but against the executors-nominate who made the transfer to him, are simply ancillary to the leading conclusions of the plaint which precede them. They are aptly framed for the purpose of ascertaining the details of the property, moveable and immoveable, which these executors-nominate were to pay or deliver to the trustees whom the Court was asked to appoint in their stead. It must be presumed that the Administrator-General, now that the transfer to him—which is a transfer of the whole estate of the deceased—will do his duty in recovering it, whether it be in the hands of the executors-nominate or of the Receiver of the Court. If the executors-nominate fail to make over to him, or to the Receiver funds or property which they have no right to retain, it will be open to the petitioner, who has the ultimate beneficial interest in the estate, to call them to account, in order that such funds or property shall be paid or transferred to the Administrator-General. Their Lordships cannot conceive that the dismissal of conclusions brought for such a special and limited purpose could afford any good ground of defence to the executors-nominate in an action of that kind.

In these circumstances, their Lordships will humbly advise Her Majesty to make no order on the petition. The costs of both parties in this application, as between solicitor and client, must be paid out of the estate of the testator.

Solicitors for the petitioner: Messrs. *T. L. Wilson & Co.*

Solicitor for the Administrator-General: Mr. *J. F. Watkins.*

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[1017] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice Macpherson and Mr. Justice Banerjee.

QUEEN-EMPRESS (ON THE PROSECUTION OF KUNJO PRAMANICK) *v.* SRI CHURN CHUNGO. [20th December, 1895.]

Theft—Wrongful gain—Wrongful loss—Penal Code (Act XLV of 1860), ss. 23, 24 *and* 378—*Removal of debtor's property by creditor to enforce payment of debt—Proceedings of Legislature—Construction of Statute.*

A creditor by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits the offence of theft as defined in s. 378 of the Penal Code.

Sections 23 and 24 of the Penal Code discussed and explained.

Prosonno Kumar Patra v. *Udoy Sant* (1) overruled.

Per PIGOT, J.—Proceedings of the Legislature cannot be referred to as legitimate aids to the construction of an Act.

Administrator-General of Bengal v. *Prem Lall Mullick* (2) followed.

[**R.**, 1 L.B.R. 334; 22 T.L.R. 222 (229); **D.**, 25 C. 416 (418); 14 C.W.N. 936=11 Cr. L J. 441=7 Ind. Cas. 257.]

THE sister of the complainant, Kunjo Pramanick, was married to a man named Krishna Pramanick. Her husband borrowed a sum of Rs. 5 from Babu Huri Nath Bagchi, and this debt with the interest on it increased to Rs. 11-8. Krishna Pramanick executed a bond for this amount. About a year ago he died leaving a widow and child. He left also a buffalo and bullock. His widow after his death went to live with her brother, Kunjo Pramanick, and took the buffalo and bullock with her. Kunjo Pramanick used to work for other people as a ploughman using his sister's buffalo and bullock in the plough. On the day in question he had gone to Jamsherpur to plough the land of one Mokunda. He was to be paid for the work. While he was preparing the land the servants of Babu Huri Nath Bagchi came and forcibly took the buffalo and bullock to Huri Babu's cutchery. Huri Babu detained the bullock and said he would not release it until the debt due from Kunjo's deceased brother-in-law was paid.

This case was referred to a Full Bench by MACPHERSON and BANERJEE, JJ. It was a reference by the Sessions Judge of [1018] Nuddea, submitting the case to the High Court under s. 438 of the Criminal Procedure Code for orders.

The letter of reference of the Sessions Judge was as follows:—

"The accused in this case relies on the principles enunciated in the able and exhaustive ruling of the Calcutta High Court in *Prosonno Kumar Patra* v. *Udoy Sant*, and claims that the taking of the bullock and buffalo, subject-matter of this case, did not amount to theft as laid down by the Hon'ble Judges of the High Court in the ruling quoted above.

"The evidence in the case consists of the complainant's statement and the admission of the accused. The Joint-Magistrate in his explanation gives the full history of the case, and relying on the unsupported testimony o the complainant and the admission of the fact of the cattle being removed has convicted the accused and sentenced him to pay a fine

(1) 22 C. 669. (2) 22 C. 788=22 I.A. 107.

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of Rs. 50 under s. 379 of the Indian Penal Code, and has also allowed Rs. 20 compensation to the complainant. It is now contended that if the statement of the complainant be believed the taking away of the cattle and their detention to cause the owner, and not the complainant, to pay up a legitimate due would not amount to theft, and the conviction is therefore bad in law and the sentence should be set aside.

"I don't think the ruling quoted by the pleader for the defence applies on all points to this case, but as the principles laid down in that very wholesome decision, which is supported by the custom prevalent in this country, apply to this case, I am inclined to think that such a taking and detention of the cattle should not be considered a criminal offence and the act not considered stealing. The defendant cannot be branded as a thief for such an act done under orders of his master who admittedly had a claim against the owner of the cattle.

"The cattle admittedly belonged to the brother-in-law of the complainant; that man died having acknowledged the defendant's claim for Rs. 11-8 annas which he had borrowed from defendant's master, who to recover his dues sent his servant, the defendant, to bring the bullock and the buffalo for the purpose of compelling the complainant's sister, or the heirs of the deceased, to pay up the sum due; the cattle were not sold but simply detained; the defendant can hardly be considered a thief as he was acting under orders. The detention for a justifiable purpose and the removal of the cattle for no other purpose or intention but to put pressure on the debtor to pay up the amount will not be regarded as criminal. It may be contended that the temporary detention of the cattle caused 'wrongful loss' to the complainant, and therefore the taking will be regarded as 'dishonest.' The Joint Magistrate has argued, or rather attempted to argue, the point in that way. But I beg to submit that, though the Hon'ble Judges do not define 'wrongful loss' in that decision, they have clearly defined the position of the latter at p. 676 (second paragraph) of that ruling. I presume the temporary loss, such as occasioned to this**[1019]** person (complainant), included in the paragraph quoted above, and I am therefore of opinion that the defendant cannot be charged with dishonest intention. How far he may be liable for a civil action for damages it is not my province to discuss here, but for the loss, if any, sustained not 'wrongfully,' he cannot be allowed to have status before a criminal tribunal and be entitled to damages from a defendant who removes his property with no dishonest intention. Not only damages are allowed, but according to the Joint-Magistrate of Meherpur, the complainant is entitled to get his wrong redressed by punishing the taker under the Criminal Code, which I consider to be wholly wrong.

"I therefore submit the case to the Honourable Judges of the High Court for such orders as they may deem necessary and equitable. I may add that the order allowing compensation to complainant from the fine is not warranted by law. The Criminal Procedure Code does not prescribe any such procedure in a theft case, and the order is extra-judicial."

On the case coming on before MACPHERSON and BANERJEE, JJ., they referred to a Full Bench the questions stated in the following order of reference:—

"This is a reference from the Sessions Judge of Nuddea, submitting the case to this Court under s. 438 of the Criminal Procedure Code for proper orders.

"The accused in this case has been convicted of theft under s. 379 of the Indian Penal Code for taking from the possession of the complainant,

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without his consent, a bullock which belonged to his late brother-in-law, Krishna Pramanick, to enforce payment of a debt which was due from Krishna Pramanick, to the master of the accused.

"The learned Joint-Magistrate in his judgment says: 'The accused pleads guilty to the charge. He is a servant of Huri Babu to whom the complainant's brother-in-law was in debt at the time of his death one and a half years ago. Huri Babu, desiring to realise the amount, sent his servants to seize the buffalo and bullock the complainant was ploughing with, being the property of his brother-in-law's widow. The amount due was only Rs. 11-8 annas, yet Huri Babu for so small an amount deprived the complainant, in part at least, of the means of earning a livelihood and supporting his sister and her child. The offence is technical. I find the accused Sri Churn Chungo guilty of an offence under s. 379 of the Indian Penal Code, and sentence him to pay a fine of fifty rupees, or in default to undergo rigorous imprisonment for two months.'

"Though the judgment states that the accused pleaded guilty to the charge, yet as the Magistrate in his discretion did not convict him on his own plea under s. 255 of the Code of Criminal Procedure, but based the conviction on the facts found, we think it is open to the accused to contend, if such contention is otherwise tenable, that upon the facts found the conviction is wrong in law. Moreover, we may add that it seems fairly clear that the [1020] accused in pleading guilty to the charge did not mean to admit the theft, but meant only to admit the taking.

"Now upon the facts found, the question that really arises for consideration in this case is, whether a person, by taking any moveable property which belonged to his deceased debtor from the possession of the legal representative of the debtor without his consent, commits the offence of theft as defined in s. 378 of the Indian Penal Code. Upon that question the decisions of this Court are conflicting, the case of *Prosonno Kumar Patra* v. *Udoy Sant* (1) being in favour of the view that such taking is not theft, while the cases of *Queen* v. *Madaree* (2), *Queen* v. *Preo Nath Banerjee* (3) and *In the matter of the petition of Tarinee Prosaud Banerjee* (4), support the opposite view. That being the case, we must refer the question stated above to a Full Bench."

The Advocate-General (Sir *Charles Paul*), on behalf of the Crown.—In this country *animus furandi* is not an essential ingredient, as it is in England. The last clause of s. 23 of the Penal Code, and illustration (*l*) of s. 378 clearly show this. The case in Weir (3rd ed.), p. 233, points out the distinction. See *Queen* v. *Madaree* (2), *Queen* v. *Preo Nath Banerjee* (3), and *In the matter of the petition of Tarinee Prosaud Banerjee* (4).

No one appeared for the accused at the hearing.

The following judgments were delivered by the Full Bench (PETHERAM, C.J., PRINSEP, J., PIGOT, J., MACPHERSON, J., and BANERJEE, J.)

JUDGMENTS.

PETHERAM, C. J.—I am of opinion that the accused was rightly convicted, and that there is no reason for the interference of the Court in this case.

A comparison of the judgment in the case of *Prosonno Kumar Patra* v. *Udoy Sant* (1) with the whole of the definitions contained in s. 23 of

(1) 22 C. 669.
(2) 3 W. R. Cr. 2.
(3) 5 W. R. Cr. 68.
(4) 18 W. R. Cr. 8.

the Penal Code, will shew that no effect has been given in that judgment to the last two paragraphs of the section.

The judgment proceeds on the assumption that when the words in the definition are read with s. 378 of the Penal Code, in place of the word "dishonestly," the section will read "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, is said to commit theft." It is evident that in making such an **[1021]** assumption the last two paragraphs of s. 23 have been left out of consideration, and if they as well as the first paragraph are read with s. 378, it will read as follows: " Whoever in order to take with the intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means property which he does not intend to acquire, moves that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprive him permanently of it, is said to commit theft." When the section is read in this way it is evident that it was the intention of the Legislature that it should be theft under the Code, to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them. This is precisely what a creditor does, who by force or otherwise takes the goods of his debtor out of his possession against his will in order to put pressure on him to compel him to discharge his debt; and it must follow that a person who does so is guilty of theft within the provisions of the Indian Penal Code. For these reasons I think that the case of *Prosonno Kumar Patra* v. *Udoy Sant* (1) was wrongly decided.

PIGOT, J. (PRINSEP and MACPHERSON, JJ., concurring).—We agree in the opinion that the case of *Prosunno Kumar Patra* v. *Udoy Sant* (1) was wrongly decided. We think that upon the facts of that case the accused had been rightly convicted of theft.

We think that it is not necessary to constitute the offence of theft that there should be shown on the part of the accused an intention [to use the words at p. 676 of 22 C.] "to gain the thing moved for the use of the gainer :" but that it is enough to show an intention to gain possession of it for a time for a temporary purpose. We think the proposition stated in Mayne's Penal Code, (14th Ed.) at p. 340 is correct. It is as follows: "It is sufficient to show an intention to take dishonestly the property out of any person's possession without his consent, and that it was moved for **[1022]** that purpose. If the dishonest intention, the absence of consent, and the moving are established, the offence will be complete, however temporary may have been the proposed retention."

We think that this proposition is in accordance with the definition of theft in s. 378 of the Code; and that it was laid down in the cases of *Queen* v. *Madaree* (2), *Queen* v. *Preo Nath Banerjee* (3) and *In the matter of the petition of Tarinee Prosaud Banerjee* (4), and in the case reported in Weir, page 233, (3rd ed.) cited in the case of *Prosonno Kumar Patra* v. *Udoy Sant* and also in the cases in Weir, (3rd ed.) at pp. 235, 244 and 245. We think that the decisions of this Court above referred to are not

(1) 22 C. 669.
(2) 3 W. R. Cr. 2.
(3) 5 W. R. Cr. 68.
(4) 18 W. R. Cr. 8.

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intended to be limited to cases coming within illustration (*l*) of s. 378, but were intended to affirm and did affirm and lay down the wider construction of the section stated in the passages from Mayne above cited which, as we have said, we hold to be correct.

We do not propose to consider the history of the Penal Code, from its original draft by Lord Macaulay in 1840 to its becoming law in 1860. Their Lordships of the Privy Council, in the recent case of *The Administrator-General of Bengal* v. *Prem Lall Mullick* (1) have held that it is not competent to refer to proceedings of the Legislature as legitimate aids to the construction of a law.

We think that an intention on the part of the accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only for that purpose, has no bearing on the question of dishonest intention under the Penal Code. To hold that such a purpose could render innocent what would be otherwise a wrongful gain within the meaning of s. 23 would amount to the recognition of a right on the part of every individual to recover an alleged debt by the seizure of property of his alleged debtor, and would tend to a state of things in which every man might, if strong enough, take the law into his own hands.

It is necessary, we think, to point this out; and perhaps the more necessary, having regard to the views expressed by the Officiating Sessions Judge in the letter in which, under the provisions of s. 438, he submits this case to the Court.

[1023] Mr. Justice Prinsep and Mr. Justice Macpherson agree in this judgment.

BANERJEE, J.—The question that arises for determination in this case is, whether a creditor, by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt, commits the offence of theft as defined in s. 378 of the Indian Penal Code.

To constitute theft as defined in the section referred to—

(1) There must be an intention to take some moveable property,

(2) The taking intended must be dishonest,

(3) It must be from the possession of another person without his consent, and

(4) There must be a moving of the property in order to such taking.

Now, if there was an intention to take here within the meaning of the section, the third and fourth requirements are evidently satisfied; for the buffalo and the bullock were taken from the possession of the debtor without his consent and were carried away. The points for consideration, therefore, are, first, whether there was an intention to take within the meaning of the section, and, second, whether the taking intended was dishonest.

That there was a taking of the animals is not denied; but it may be said that the taking contemplated by the section is a permanent taking and not a mere temporary taking, such as there has been in this case, in order to force the debtor to pay his debt. I do not think that such a view is correct. Illustration (*l*) of the section clearly shews that taking a thing with the intention of keeping it only for a time is taking within the meaning of the section.

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(1) 22 C. 788 = 22 I. A. 107.

1895 DEC. 20.

FULL BENCH.

22 C. 1017 (F.B.).

It remains now to consider whether the taking in this case was a dishonest taking according to the definition of "dishonestly" in s. 24, that is to say, whether the taking was "with the intention of causing wrongful gain to one person or wrongful loss to another." I think the question must be answered in the affirmative, as the creditor in taking and detaining the animals intended to cause both wrongful gain to himself and wrongful loss to the [1024] debtor within the meaning of s. 23; for he retained, by unlawful means, property to which he was not legally entitled, and he unlawfully kept his debtor, who was legally entitled to the property, out of possession and enjoyment of the same. "Wrongful gain" according to the definition in s. 23 is constituted not only by wrongful acquisition of property (which is in accordance with the ordinary meaning of the words) but also by wrongful retention of the same, even though such retention does not result in any profit to the person retaining it; so "wrongful loss" is constituted not only by wrongful deprivation of property, but also by the being wrongfully kept out of the same.

And a thing is said to be done "dishonestly" according to the definition in s. 24, not only when it is done with the intention of causing wrongful gain to one person in the first mentioned sense of the words "wrongful gain" (and this is in accordance with the ordinary popular signification of the term), but also when it is done with the intention of causing wrongful gain in the other sense, or done only with the intention of causing wrongful loss to some one, though such loss to one person may not be accompanied by any wrongful gain to another.

It is this comprehensive nature of the definition of "dishonesty" in the Indian Penal Code which brings within the definition of "theft" cases which may not come under the ordinary popular signification of the term, and which has led to the use of such expressions as "technical theft."

By graduating the scale of punishment for theft from rigorous imprisonment for three years *and* fine limited only by the power of the Court holding the trial to a nominal fine, the Penal Code has no doubt provided a safeguard against its comprehensive definition of theft leading to any hardship. But there is one anomaly which the criminal law on this point has not been able to avoid. The offence of theft is made a non-bailable offence (see sch. II of the Code of Criminal Procedure); so that, though a person accused of theft may after conviction be let off with a fine only, if his offence be a light one, yet before conviction and pending trial he must, unless the case comes under s. 497 of the Criminal Procedure Code, or unless a superior Court interferes under s. 498, remain in custody.

[1025] In making the foregoing observations, I must guard myself against being supposed to under-estimate the gravity of an offence like the one which has been committed in this case.

The view I take, namely, that the act of the accused in this case comes within the definition of theft in s. 378 of the Indian Penal Code, is in accordance with the general consensus of opinion in this Court and in the High Courts of Bombay and Madras. I need only refer to *Queen* v. *Madaree* (1), *Queen* v. *Preo Nath Banerjee* (2), *In the matter of the petition of Tarinee Prosaud Banerjee* (3), *Queen-Empress* v. *Nagappa* (4) and the Madras case reported in Weir's Law of Offences and Criminal Procedure, 3rd edition, p. 233. Against these authorities there is the case of *Prosonno Kumar Patra* v. *Udoy Sant* (5) which no doubt takes the opposite view.

(1) 3 W. R. Cr. 2. (2) 5 W. R. Cr. 68. (3) 18 W.R. Cr. 8.
(4) 15 B. 344. (5) 22 C. 669.

1895 DEC. 20. — FULL BENCH. — 22 C. 1017 (F.B.).

Being the latest case on the point and the one that has led to this Full Bench Reference, it requires examination.

The grounds of the decision in *Prosonno Kumar Patra* v. *Udoy Sant* (1) are, shortly stated, these three:—

(1) The taking contemplated by s. 378 of the Indian Penal Code is either a permanent taking or a temporary taking with intent to appropriate the thing taken to the taker's use.

(2) The definition of "dishonestly" read with s. 378 shows that the wrongful gain of the thing moved must mean gain of the thing "for the use of the gainer" and not mere "gaining possession of it for a temporary purpose."

(3) The omission from the Code as enacted of certain provisions which were inserted in the draft Code supports the view embodied in the first ground.

I have already shown that the first mentioned ground is not sound, as it is opposed to illustration (*l*) of s. 378.

The second ground deals with only one part of the definition of "dishonestly," namely, that which speaks of wrongful gain in one of the two senses in which that expression is used, and it takes no notice of the other part which refers to wrongful loss, nor of the other meaning of wrongful gain. But as I have shown above [1026] dishonesty is constituted by either of these two elements in either of the two senses being present; and there can be no doubt that both wrongful gain and wrongful loss were intended to be caused in this case.

As to the third ground, it is enough to say that if the definition in the Code as enacted clearly includes, as I think it does, a case like the present, the omission from it of certain provisions that found a place in the draft Code can warrant no safe inference to the contrary.

For all these reasons I agree generally in the opinion expressed by Mr. Justice Pigot. I must respectfully dissent from the decision in *Prosonno Kumar Patra* v. *Udoy Sant* (1), and answer the question referred to us in the affirmative.

That being my opinion, I must hold that the accused in this case has been rightly convicted of theft: and there being no reason to think that the punishment is too severe, I would affirm both the conviction and the sentence.

S. C. B.

(1) 22 C. 669.

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means the entire verdict on all the charges, and is not limited to the verdict on a particular charge upon which an accused may have been convicted and have appealed against. Where an accused person is charged with and tried for various offences arising out of a single act, or series of acts, it being doubtful which of those offences the act or acts constitute, and where he has been acquitted by the verdict of a jury of some of such offences and convicted of others and appeals against such conviction, and where the Appellate Court reverses the verdict of the jury, and orders a retrial without any express limitation as to the charges upon which such retrial is to be held, such retrial must be taken to be upon all the charges as originally framed, and the acquittal by the jury on the previous trial upon some of such charges is no bar to the accused being tried on them again, as, having regard to the provisions of s. 423 of the Code of Criminal Procedure, the provisions of s. 403 in that respect cannot apply to such cases. KRISHNA DHAN MANDAL v. QUEEN-EMPRESS, 22 C. 377 ... 252

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(2) S. 2—See IMMOVEABLE PROPERTY, 22 C. 752.

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S. 22—Illegal seizure of cattle—Theft—Compensation—Fine—Imprisonment in default of payment of compensation—Crim. Pro. Code (Act X of 1882). s. 386—Penal Code, s. 378.—An accused was found to have loosed the complainant's cattle at night from a cattle pen, and to have driven them to the pound with the object of sharing with the pound-keeper the fees to be paid for their release He was proceeded against under Act I of 1871 (The Cattle Trespass Act). and under the provisions of s. 22 ordered to pay compensation to the complainant, and in default to undergo one month's rigorous imprisonment. *Held*, that s. 22 was inapplicable to the facts of the case, and that the order must be set aside. On the facts it was not a case of "illegal seizure and detention" of cattle, but rather one of theft, as all the elements of that offence were present, and the accused should have

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been charged with and tried for that offence. *Held*, further, that the sentence of imprisonment in default of payment of the compensation was not warranted by law. Compensation may be levied as a fine, and the ordinary mode of levying fines is laid down in s. 386 of the Code of Criminal Procedure. The law nowhere provides that fines may be levied by means of imprisonment. PARYAG RAI v. ARJU MIAN, 22 C. 139 ...

Act II of 1874 (Administrator-Generals).

(1) S. 31—*Transfer by Hindu executor to Administrator-General—Construction of Statutes.*—The right of executors to devolve the property of their testator, with all powers and duties relating to its administration, upon the Administrator-General, conferred by s. 31 of Act II of 1874, is not confined to any particular class of executors or of estates. The right is given to any executor in whom estate of the deceased has been vested by virtue of the probate upon the one condition that the Administrator-General shall consent. It is not required that in a consolidating statute each enactment, when traced to its source, must be construed according to the state of things which existed at a prior time when it first became law; the object being that the statutory law, bearing on the subject, should be collected and made applicable to the existing circumstances; nor can a positive enactment be annulled by indications of intention, at a prior time, gathered from previous legislation on the matter. Proceedings of the Legislature in passing a statute are excluded from consideration on the judicial construction of Indian, as well as of British, statutes. Executors having obtained probate of the will, and possession of the estate, of a Hindu testator, executed a deed, purporting to be in terms of s. 31, Act II of 1874, transferring the property, vested in them by the probate, to the Administrator-General. *Held* reversing the judgment of a majority of the Appellate Court, and affirming that of the Chief Justice, that this transfer was valid under that section. THE ADMINISTRATOR GENERAL OF BENGAL v. PREMLAL MULLICK, 22 C. 788 (P.C.) = 22 I.A. 107 = 6 Sar. P.C.J. 603 ... 522

(2) S. 31—See APPEAL (TO PRIVY COUNCIL), 22 C. 1011.

(3) S. 56—See EXECUTOR, 22 C. 14.

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(1) S. 3 (5)—See CHOWKIDARI TAX, 22 C. 680.

(2) Ss. 15, 16—*Operation of those sections in a suit for rent of land, to which the plaintiff succeeded before the Bengal Tenancy Act came into force.*—Ss. 15 and 16 of the Bengal Tenancy Act are not retrospective. PROFULLAH CHUNDER BOSE v. SAMIRUDDIN MONDUL, 22 C. 337. 226

(3) S. 23—See LANDLORD AND TENANT, 22 C. 742.

(4) S. 29—See CONTRACT ACT (IX OF 1872), 21 C. 658.

(5) Ss. 65, 148, cl. (h), 176, 161, 167—*Estoppel—Mortgagor and mortgagee—Order in execution proceedings against mortgagee—Decree*

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obtained before Bengal Tenancy Act came into force—Execution under former Rent Law—Incumbrance—Mode of annulling incumbrance—Sale for arrears of rent—Charge of rent as first charge on tenure—Sale in execution of mortgage decree—Decree for sale.—By a mortgage bond, dated 22nd August 1884, and registered, *K* created a charge in favour of the plaintiff on six *taluks* for repayment of the mortgage debt, in respect of two of which *taluks* suits had been brought by the zemindar for arrears of rent, and decrees obtained on 6th June 1885, before the coming into operation of the Bengal Tenancy Act (VIII of 1885). After that Act had come into force, these decrees were assigned to *G*, a *benamidar* for *P*, for execution, and on his seeking to execute them, he was opposed by *K* on the ground that, as the transfer of the decree by assignment, and the subsequent application for execution, were made after the Bengal Tenancy Act had come into force, and as *G* the assignee had acquired no interest in the *taluks*, his application for execution could not be granted under s. 148, cl. (*h*) of that Act. On the 9th July 1886 the Court overruled this objection, and ordered execution to issue, holding that as the decrees in the rent suits were passed before the Tenancy Act came into operation, the execution should proceed under the old law. In execution of the decrees the two *taluks* were put up for sale, and purchased by *G* as *benamidar* for *P*. In a suit brought by the plaintiff, the mortgagee, against *K* and *P* (and others representing others of the six (*taluks*), it was contended, so far as the two *taluks* were concerned, that the plaintiff, though not a party to the execution proceedings, was bound by the order of the 9th July 1886, made in the course of those proceedings; that *P* having purchased the two *taluks* at sales for arrears of rent had acquired them free from all incumbrances; that the plaintiff's mortgage was not a notified incumbrance within the meaning of s. 161 of the Tenancy Act; and that he was, therefore, not entitled to have his mortgage lien declared against the two *taluks*. *Held* (affirming the judgment of the lower appellate Court), that the plaintiff was not bound by the order of 9th July 1886, *K* the mortgagor not representing his interest sufficiently to make that order binding on the plaintiff as mortgagee. The proprietor of an estate cannot be said to represent the whole estate after he has mortgaged it: and this distinguishes the case of a mortgagor as representing an estate from that of a Hindu widow, or *shebait*, who are held to represent the estate so as to bind the reversioner or the succeeding *shebait*. The interest of a mortgagee in an estate may be greater than that left in the mortgagor, or, as in the present case, where it was no part of the mortgagor's interest to protect the incumbrance, the interests of the mortgagor and mortgagee are not identical; the balance of justice and expedience, therefore, is in favour of not allowing a mortgagee to be bound by an order made against his mortgagor. Nor is there anything in the provisions of the rent law against that view. A decree for rent of a tenure obtained against the registered tenant binds an unregistered transferee of the tenure, who can show no sufficient cause for not registering his name, and may be enforced by sale of the tenure; but whether any such sale was in sufficient conformity with the rent law to be operative in annulling a prior mortgage, or other incumbrance,

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must be determined in the presence of the party claiming the benefit of the incumbrance. *Held*, also, that, though the rent decrees were passed under the old rent law, the assignment and the application by the assignee for execution having been made after the Bengal Tenancy Act came into force, clause (*h*) of s. 148 of that Act applied to the execution proceedings and the sale on such an application which is prohibited by that clause must be held to be no sale under the rent law. The clause does not affect any vested right. All that it prohibits is an application for the enforcement of the decree by an assignee, and that is a matter of procedure. If any right is affected, it is not a right of the decree-holder, but the right of the assignee of the decree to apply for execution, and in this case there was no such assignee before the Bengal Tenancy Act came into force. The mode provided by s. 167 of the Bengal Tenancy Act is the only mode in which incumbrances can be annulled by purchasers of tenures for arrears of rent, and that mode not having been followed in this case, the incumbrance on the two *taluks* was not annulled. S. 65 of the Tenancy Act, which provides that "the tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon," only intends what is laid down in ch. XIV of the Act, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances; and if in any case the decree for rent either has not been, or cannot be, enforced by the sale of the tenure, the charge created by s. 65 cannot be enforced in any other way. No reason, therefore, could be shown under that section for making the sale in satisfaction of the plaintiff's mortgage, subject to the rent decree as a first charge. SOSHI BHUSUN GUHA v. GOGAN CHUNDER SHAHA, 22 C. 364 244

(6) S. 67—See ENHANCEMENT, 22 C. 214.

(7) Ss. 69, 70, *cl.* 5—*Deposit of crops by order of Collector—Suit against depositaries—Right of suit—Privity—Cause of action.*—In the course of proceedings held under ss. 69 and 70 of the Bengal Tenancy Act (VIII of 1885), the landlord's (ticcadar's) share of the produce was deposited by the Amin, by order of the Collector, with two persons. The depositaries executed and delivered a receipt to the Amin. Some time after the ticcadar made an application to the Collector in order to obtain his share of the produce, but on a representation being made by one of the depositaries that the crops (with the exception of a small portion) had been destroyed by rain, the Collector declined to grant any relief to the ticcadar. The ticcadar then brought this suit against the depositaries for recovery of the value of the crops deposited. *Held*, that the receipt executed and delivered to the Amin established privity between the plaintiff and the defendant so as to enable the former to maintain the suit. *Held*, also, that the suit was maintainable in the Civil Court. Ss. 69 and 70 of the Bengal Tenancy Act refer to and contemplate proceedings between the landlord and the tenant. When a plaintiff seeks relief, not against his tenant, but against a third party a depositary or bailee, the suit is not barred by anything contained in those sections. JAGA SINGH v. CHOOA SINGH, 22 C. 480 321

(8) S. 74—See CHOWKIDARI TAX, 22 C. 680.

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(9) *S.* 95—*Manager of estate—Obligation of Manager to have his name registered before he can collect rent of estate—Land Registration Act* (*Bengal Act* VII *of* 1876), *s.* 78.—A person who has been appointed manager of an estate under the provisions of s. 95 of the Bengal Tenancy Act must have his name registered under the provisions of s. 78 of the Land Registration Act before he can recover rent from the tenants of the estate of which he has been appointed manager. MAQBUL AHMED CHOWDHRY *v.* GIRISH CHUNDER KUNDU, 22 C. 631 ... 422

10) *Ss.* 101, 102—*Power of Revenue Officer—Decision of Special Judge*—Res judicata—*Question whether land is* mal *or lakhiraj- Limitation —Sale for arrears of revenue—Act XI of* 1859, *ss.* 37, 53—*Incumbrance—Adverse possession.*—The plaintiff had been proprietor of an estate which was sold for arrears of Government revenue and re-purchased from the then purchaser by the plaintiff in 1886. He applied under ch. X of the Bengal Tenancy Act for the measurement of the estate and the preparation of a record of rights, and the Revenue Officer deputed for these purposes found that a portion of the estate held by the defendant was *mal* land, though it was held as *lakhiraj* under certain *sanads*, and as he also found that no rent had ever been paid for, it was entered on the record of rights as *mal* land held under those *sanads* as *lakhiraj*. The Special Judge, on appeal by the plaintiff, held that the land having been found to be *mal* should have been entered as *mal* land unassessed with rent. In a suit to have the land assessed with rent it was found that the *sanads*, under which the defendant claimed to hold, were granted not by any predecessor in title of the plaintiff, and were of a date anterior to the Permanent Settlement: *Held* (reversing the decision of the lower appellate Court), that the Special Judge had no jurisdiction to determine whether the land was *mal* or *lakhiraj*, and that his judgment as to its being *mal* did not therefore operate as *res judicata*. *Held*, also, that the adverse possession set up by the defendant was, within the meaning of s. 53 of Act XI of 1859, an incumbrance subject to which the plaintiff, as a proprietor whose estate had been sold, took it on re-purchase. If such adverse possession, therefore, were sufficiently long the suit would be barred by limitation. The plaintiff could not be regarded as a person who had acquired the estate "free from all incumbrances which may have been imposed upon it after settlement," as provided by s. 37 of Act XI of 1859, and could not therefore claim (as held by the lower appellate Court) that his suit was not barred, having been brought within twelve years from the date of the sale for arrears of revenue. The case was remanded for findings whether the land was *mal* or *lakhiraj*, and whether the defendant's adverse possession was long enough to bar the suit. KARMI KHAN *v.* BROJO NATH DAS, 22 C. 244 ... 164

(11) Ss. 106, 108—See APPEAL (SECOND APPEAL), 22 C. 477.

(12) *S.* 155—*Suit for ejectment—Notice, Sufficiency of—Omission from notice of requisition on tenant to pay compensation—Alternative relief.* — The words of s. 155 of the Bengal Tenancy Act, "and in *any* case to pay reasonable compensation," &c., mean in *every* case; and a notice not containing a requisition to the

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tenant to pay such compensation is insufficient to support a suit for ejectment brought under that section. Where the suit was for ejectment from certain land, but the plaint contained other prayers, namely, for a declaration that the defendant had no right to build houses on the land, and for an injunction on him to remove houses he had built thereon, and the suit for ejectment failed from the insufficiency of the notice under s. 155, the Court held that the plaintiff was not entitled to a declaration or injunction as asked for. PERSHAD SINGH v. RAM PERTAB ROY, 22 C. 77 54

(13) Ss. 171, 174—See CO-SHARERS, 22 C. 800.

(14) S. 174—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 767.

(15) *Sch.* III, *art.* 6—*Limitation Act* (XV *of* 1877), *art.* 179—*Execution of decree—Period from which limitation runs—Date of decree—Date of payment.*—On the 26th of May 1890 a rent decree was passed for the sum of Rs. 400, payable on the 15th August 1890 On the 9th August 1893 the decree-holders applied for execution of the decree: *Held*, the period of limitation ran from the date of the decree and not from the date fixed for payment, and that the application was barred by art. 6 of sch. III, Act VIII of 1885. RAM SADAY MUKERJEE v. DWARKA NATH MUKERJEE, 22 C. 644 ... 429

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Act II of 1869 (Chota Nagpur, Landlord and Tenant Procedure).

Register prepared by a Special Commissioner appointed under the Act, Effect to be given to, as evidence—Conclusive nature of such register.—A register of tenures prepared by a Special Commissioner appointed under Bengal Act II of 1869 (The Chota Nagpore Tenures Act) after it has been confirmed by the Commissioner of the Division, and such confirmation has been duly published in the *Calcutta Gazette*, is conclusive evidence of all matters recorded therein, and it is not open to a Civil Court to hold that, because a Special Commissioner did not rightly understand a decision of the Commissioner, and because the register was not prepared in accordance with such order, it is otherwise than conclusive; nor is a Court competent even to discuss the question whether a Special Commissioner, in preparing such register, rightly appreciated the Commissioner's decision, when his own order has been given effect to by the register prepared, and has been confirmed by the Commissioner under s. 25 of the Act. PERTAB UDAI NATH SAHI DEO v. MASI DAS, 22 C. 112. 76

Act VIII of 1869 (Landlord and Tenant Procedure, Bengal).

(1) S. 5—See CONTRACT ACT (IX OF 1872), 22 C. 658.

(2) S. 11—See CHOWKIDARI TAX, 22 C. 680.

Act VI of 1870 (Bengal Village Chowkidars).

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Act VII of 1876 (Bengal Land Registration). PAGE

(1) *Ss.* 42, 78—*Administrator—Obligation of Administrator to register his name before bringing suits for rent.*—A person who is an administrator, and as such the representative of a deceased proprietor of an estate and legal owner of his property, is bound to be registered under s. 42 of the Land Registration Act (Bengal Act VII of 1876) before he can sue the tenants of the estate for rent. MCINTOSH v. JHARU MOLLA, 22 C. 454 ... 303

(2) S. 78—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 634.

Act VIII of 1876 (Estates Partition, Bengal).

Ss. 112 *and* 116—*Penal Code, s.* 186—*Obstructing public servant in discharge of his public functions—Amin, Power of, to measure lands in Butwara proceedings—Public functions.*—The public functions contemplated by s. 186 of the Penal Code mean legal or legitimately authorized public functions and were not intended to cover any act that a public functionary might choose to take upon himself to perform. A *butwara* Amin, in proceeding to measure certain lands in the course of proceedings connected with the partition of an estate under Bengal Act VIII of 1876, was obstructed by certain persons who claimed the lands and objected to their being measured. The lands were stated in the report of the Amin to be the common land of estate No. 546, and of certain other estates. The persons who obstructed him were not co-sharers in that estate, and contended that the land sought to be measured had been divided amongst the *maliks* of the different estates, and different portions of it had been held separately by them. The persons so obstructing the Amin were charged with an offence under s. 186 of the Penal Code, the Deputy Collector in charge of the *butwara* proceedings being of opinion, that s. 112 of the Act applied, and that the Amin was entitled to measure the land. The accused were convicted. *Held*, that s. 112 is limited to cases where the community of interest in the land in dispute between the proprietors of the estate under partition as a body and the proprietors of other estates is admitted. When this is not admitted the provisions of s. 116 apply. *Held*, further, that as there was no evidence to show that such community of interest was admitted, the accused were entitled to the benefit of the doubt, and to have the case treated as one under s. 116, and that as the procedure laid down in that section had not been followed, the Amin had no power to measure the lands, and could not be said to be a public servant acting in discharge of his public functions, and that the conviction must consequently be set aside. LILLA SINGH v. QUEEN-EMPRESS, 22 C. 286 ... 192

Act I of 1879 (Chota Nagpore Landlord and Tenant Procedure).

S. 88—*Decree for rent and cancelment of lease, Execution of—Appellate decree, Effect of.*—A decree under s. 88 of the Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), provided that, on failure of the defendant (tenant) to pay the amount due under the decree within fifteen days, his lease should be cancelled. An appeal preferred against the decree was dismissed, and the defendant paid the decretal amount within fifteen days of the date of the appellate decree. Some time after the decree-holder applied for execution of the decree and cancelment of the lease. The

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—(*Concluded*). PAGE

application was rejected by the Court below. *Held*, that in a case where the decree of the original Court was not executed pending the appeal to the higher Court, the words "date of the decree" in the latter part of s. 88 of Act I of 1879 ought to be read as the date of the *final* decree; that the decree of the appellate Court was the final decree and the only decree capable of execution; and the payment of the decretal amount having been made within fifteen days of that decree, the application for execution was rightly disallowed. NAM NARAIN SINGH v. LALA ROGHUNATH SAHAI, 22 C. 467 ... 312

Act VII of 1880 (Bengal Public Demands Recovery).

Order of Revenue Commissioner setting aside sale—Review of order setting aside sale—Civ. Pro. Code, s. 566—Remand—Power of High Court in second appeal.—A revenue-paying *taluk* was sold for arrears of *dak* cess under the Public Demands Recovery Act. The sale was set aside on appeal by the Revenue Commissioner, but on an application for review made to his successor, the sale was confirmed and the purchaser took possession. In a suit to recover possession of an 8 annas share of the *taluk* on the grounds, among others, that the order, on review, was passed without jurisdiction and without notice to the plaintiffs, and as such conferred no title on the purchaser, the District Judge, on appeal, held that the order on review not having been set aside remained in force, but he remanded the case under s. 566 for trial of the question of notice. On the case coming back to the appellate Court, before another Judge, he held the order on review to be *ultra vires*, and the trial of the question of notice to be unnecessary. The defendants preferred a second appeal against the last judgment. *Held*, that on the hearing of the appeal, the entire case, including the order of remand, was open to consideration, and that the High Court had power to determine whether that order or the order subsequently passed was correct on the merits. *Held*, also, that the provisions of the Code of Civil Procedure relating to reviews of judgment were not extended to proceedings under Bengal Act VII of 1868 and VII of 1880, and that in the present case, the order passed on review, confirming the sale, was *ultra vires* and of no effect. *Held*, further, following the ruling in 14 C. 1, that an appeal lay to the Revenue Commissioner against the Collector's order affirming the sale. LALA PRYAG LAL v. JAI NARAYAN SINGH, 22 C. 419 ... 280

Act III of 1884 (Bengal Municipal).

S. 133—*False statement contained in application for license—Municipal Commissioners, Power of, to institute prosecution under Penal Code—Penal Code, ss. 182, 199, 417 and 511—Revisional power of High Court—Power of High Court to interfere in pending proceedings.*—On the 5th May 1894, *C* applied in writing under the provisions of s. 133 of Act III of 1884 to a municipality for a license to be granted to him in respect of two carriages and six ponies, and filled up and signed the usual statement required by the section. The sum payable in respect of the license was received, and the license asked for by *C* was granted to him, and at the same time the statement was sent to an overseer of the municipality for verification. On the

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7th May the overseer reported that *C* had in his possession eight ponies and one horse. On the 8th May the chairman of the municipality passed an order directing *C* to be prosecuted for making a false statement in the schedule to his statement regarding the number of animals in respect of which he applied for the license. On the 9th May *C* presented a petition asking that the tax on the three animals might be received, and stating that he did not think he was liable to take out a license for them, as they were old and diseased and unfit for work. On the 13th May the chariman passed an order on this application that he had no power to interfere, as the prosecution of *C* had already been ordered. Meanwhile, on the 9th May, a paper was sent to the Magistrate headed "List of municipal cases under Act III of 1884," in which *C* appeared as charged with an offence under s. 199 of the Penal Code for "filing a false statement, that is to say, putting down in the schedule six ponies only instead of eight ponies and one horse. On the 12th May the Deputy Magistrate directed a summons to issue to *C* returnable on the 23rd. On the 18th May the District Magistrate passed an order to the effect that the municipality could not institute a prosecution under the Penal Code, but that the Deputy Magistrate had power to do so, and that he should consider the provisions of ss. 182 and 417, read with s. 511, of the Penal Code, as applicable to the facts of the case. On the 19th May the summons was issued, and the case was heard on the 23rd and 24th May and 19th June, on which date formal charges under ss. 199, 182 and 417-511 of the Penal Code were framed. Thereafter the hearing proceeded till the 16th July, when on an application to the High Court the proceedings were stayed, and a rule issued to show cause why they should not be quashed. It was contended at the hearing of the rule that the High Court should not interfere at that stage of the proceedings under its revisional jurisdiction. *Held*, that the High Court has power to interfere at any stage of a case, and that when it is brought to its notice that a person has been subjected, as in this case, for over two months to the harassment of an illegal prosecution, it is its bounden duty to interfere. *Held*, further, that it was quite clear that the municipality had no power to institute the proceedings, and that having regard to the provisions of s. 191 of the Code of Criminal Procedure, it did not appear that the Deputy Magistrate, having no private complainant before him, had power of his own motion to institute them; but that whether he had such power or not, the admitted facts of the case did not in law constitute any of the offences with which *C* was charged, and that the whole proceedings must be quashed. The Municipal Act is intended to be complete in itself as regards offences committed against the Municipal Commissioners, and there is no indication of any intention to render a delinquent also liable to punishment under the Penal Code. There is no penalty in the Act attached to the omission to make a return under s. 133, and no words in the Act constituting the making a false return a penal offence; and as there are no such words in the Act as are necessary to make the provisions of the Penal Code applicable, the Court has no power to import them. The Municipal Commissioners in such a case have the remedy provided by the Act itself. CHANDI PERSHAD v. ABDUR RAHMAN, 22 C. 131 ... 89

Act II of 1888 (Calcutta Municipal Consolidation). PAGE

(1) Ss. 8, 14, 20, 21, 22, 23, 31, 32—See MUNICIPAL ELECTION, 22 C. 717.

(2) *S. 87—Schedule II—Insurance Companies registered in England and carrying on business through agents in Calcutta, Liability of, to pay the Municipal License Tax.*—The Standard Marine Insurance Company, being an Insurance Company which is registered in England and carries on insurance business through the agency of a firm of general merchants in Calcutta, is not liable to pay the license tax imposed by s. 87 and the second schedule of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888). The business of insurance is not one of the occupations mentioned in the second schedule to the Act, and s. 87 only imposes the tax upon persons who exercise some or one of the professions, trades or callings mentioned in that schedule. The words of the section limit its operation to "persons," which expression includes joint stock companies who exercise the particular occupations prescribed in the schedule. The Standard Marine Insurance Company is not liable to be taxed, as keepers of a place of business, under class VI of the second schedule of the above Act, because its business is carried on in Calcutta by its agents at their own offices, and the Company has no place of business of its own at all in Calcutta. CORPORATION OF CALCUTTA v. STANDARD MARINE INSURANCE COMPANY, 22 C. 581 387

Administrator.

See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 22 C. 454.

Admiralty Jurisdiction.

See PRACTICE, 22 C. 511.

Adultery.

See DIVORCE, 22 C. 544.

Adverse Possession.

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 244.

(2) See LIMITATION ACT (XV OF 1877), 22 C. 445, 460.

Affidavit.

Of documents, sufficiency of—See INSPECTION, 22 C. 105.

Agent.

Of Court of Wards, suit against Collector as—See RIGHT OF SUIT, 22 C. 729.

Agreement.

Entered into with party to suit—See RECEIVER, 22 C. 648.

Alternative Relief.

See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 77.

Ameen.

Power of to measure lands—See ACT VIII OF 1876 (ESTATES PARTITION, BENGAL), 22 C. 286.

Appeal.

1.—GENERAL.

2.—SECOND APPEAL.

3.—TO PRIVY COUNCIL.

Appeal—1.—General. PAGE

(1) *Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 108, 591—Ex parte *decree—Order setting aside* ex parte *decree.*—The words "affecting the decision of the case" in s. 591 of the Civ. Pro. Code mean "affecting the decision of the case with reference to the merits of it." Where an *ex parte* decree was set aside by an order under s. 108 of the Civ. Pro. Code, and the suit heard upon the merits and dismissed: *Held*, that such order was not an order affecting the decision of the case under s. 591 and was not appealable under that section. CHINTAMONY DASSI *v.* RAGHOONATH SAHOO, 22 C. 981 ... 651

(2) *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 331—*Specific Relief Act* (I *of* 1877), *s.* 9.—*A* obtained a decree for possession of certain land against *B* and others under s. 9 of the Specific Relief Act. He was obstructed by the defendant, a third party, when he went to take possession. Thereupon he applied to the Munsif's Court for the removal of the obstruction, and his application was registered as a regular suit under s. 331 of the Code of Civil Procedure. The Munsif gave the plaintiff a decree. On appeal the Subordinate Judge reversed it. Against the order of the Subordinate Judge the plaintiff appealed to the High Court, on the ground that the proceedings under s. 331 were merely a continuation of the original suit under s. 9 of the Specific Relief Act, and as no appeal lay against a decision passed under that section, no appeal lay to the Subordinate Judge. *Held*, that proceedings under s. 331 of the Code are in the nature of a fresh suit between the decree-holder and a third party, and therefore an appeal lay to the Subordinate Judge. NASIR ALI FAKIR *v.* MEHER ALI, 22 C. 830 ... 549

(3) *Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 629, 586, 588 *and* 591—*Order granting a review in a suit of Small Cause Court nature valued at less than Rs.* 500.—In a suit of a nature cognizable by a Small Cause Court and valued at less than Rs. 500, an order granting a review was passed by the Appellate Court without recording any reason for it. An appeal was preferred against that order to the High Court under s. 629 of the Code of Civil Procedure. *Held*, that the order was bad, being in contravention of the provisions of s. 625 of the Code of Civil Procedure. *Held*, also, upon the objection of the respondent that no appeal lay against the above order, that the appeal was permissible under s. 629, the provisions whereof are not controlled or superseded by s. 591 of the Code. Questions raised in an application for review are totally different from those raised in the suit; a review can only be granted on special grounds, and it may well be that, although an appeal is not allowed from the final decree in the suit, an appeal is allowable from an order granting a review, which could re-open the case after it had been disposed of. GYANUND ASRAM *v.* BEPIN MOHUN SEN, 22 C. 734 ... 487

(4) *Order granting reivew of judgment—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 629.—In general final appeal on order for review can only be challenged upon the grounds stated in s. 629 of the Civ. Pro. Code. BARODA CHURN GHOSE *v.* GOBIND PROSHAD TEWARY, 22 C. 984 ... 653

(5) *Order granting review of judgment—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 629.—No appeal lies from an order granting a review of judgment except as provided by s. 629 of the Civ. Pro. Code. HAR NANDAN *v.* BEHARI SINGH, 22 C. 3 ... 3

Appeal—2.—Second Appeal. PAGE

(1) *Bengal Tenancy Act* (VIII *of* 1885), *Chapter* X, *ss.* 106, 108—*Record of rights, dispute prior to the preparation of—Standard of measurement, question of.*—In a proceeding under Chapter X of the Bengal Tenancy Act, a dispute arose between the parties, before the preparation of the record of rights, on the question of the local standard of measurement. The Settlement Officer decided the case in favour of the plaintiffs, and, on appeal to the Special Judge, the decision was upheld. *Held*, that the order of the Settlement Officer was not one under s. 106 of the Bengal Tenancy Act, and under cl. (3) of s. 108 no second appeal lay to the High Court. ANAND LAL PARIA v. SHIB CHUNDER MUKERJI, 22 C. 477 ... 318

(2) Power of High Court in—See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 22 C. 419.

(3) See CHOWKIDARI TAX, 22 C. 680.

(4) See SALE, 22 C. 802.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 179.

———**3.—To Privy Council.**

(1) *Abandonment on appeal of part of amount of claim—Reduction of claim to below prescribed limit of appealable amount.*—The defendants, having a *bona fide* intention to appeal in respect of the whole amount decreed, obtained the certificate and admission of their appeal as competent within the Code of Civil Procedure. Afterwards, in their printed case and at the hearing, they withdrew part of their appeal, reducing, by so doing, the amount in dispute to one below the limit prescribed for appeals, where there is no special leave obtained. *Held*, that this did not render the appeal incompetent. KALKA SINGH v. PARAS RAM, 22 C. 434 (P.C.)=22 I.A. 68=6 Sar. P.C.J. 545=5 M.L.J. 14=Rafique and Jackson's P.C. No. 137 ... 290

(2) *Application for leave to appeal—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 595—*Letters Patent of the High Court, ss.* 39, 40 - *Order refusing the appointment of a Receiver in a suit.*—There is no appeal to Her Majesty in Council against an order refusing the appointment of a Receiver in a suit. Such order does not finally decide any matter which is directly in issue in the cause in respect to the right of the parties, and is not "final" within the meaning of cls. (*a*) and (*b*) of s. 595 of the Civ. Pro. Code and s. 39 of the Letters Patent; nor is the matter a special case falling within the terms of cl. (*c*) of s. 59 of the Code or s. 40 of the Letters Patent. CHUNDI DUTT JHA v. PUDMANUND SINGH BAHADUR, 22 C. 928 ... 614

(3) *Effect of order of Privy Council dismissing suit on power of High Court to make order in suit—Petition for the amendment of an order in Council dismissing a suit—Receiver's liability to account—Rights as between the Administrator-General and executors transferring estate to him* (s. 31, *Act* II *of* 1874), *and the petitioner interested in the estate.*—A Court having appointed a Receiver in a suit has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending. The estate is in its hands, and the Receiver is its officer, and the dismissal of the suit by an Appellate Court does not alter that state of things. The original Court in such a case may permit parties interested to intervene on questions as to the accounts, and may deal with costs and

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other matters. In a suit, by a plaintiff interested in the estate, wholly based on the alleged illegality of its transfer, by the executors named in the will of a Hindu, to the Administrator-General (Act II of 1874, s. 31), decrees were made by the High Court, Original and Appellate, in the plaintiff's favour. The Judicial Committee, however, held the transfer legal; and the suit, brought against the Administrator-General and the executors as co-defendants, was dismissed. *Held*, on the plaintiff's petition for such modification of the order dismissing the suit as would maintain what had been ordered below relating to the accounts, thereby enabling the High Court to bring matters in dispute to an end, that there were no grounds for the amendment. Their Lordships' opinion was that the High Court would not be deprived of any jurisdiction in that respect by the dismissal of the suit. If it should be necessary to the carrying out of the transfer that the Administrator-General should take proceedings, he could do so. To make orders upon the Court's Receiver was within its powers; and either the Receiver or the executors could be called to further account without the petitioner being met by the defence of prior adjudication of the matter (s. 13 of the Code of Civil Procedure.) *In the matter of the petition of* PREM LALL MULLICK. THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK, 22 C. 1011 (P.C.) = 22 I.A. 203 = 5 M.L.J. 157 = 6 Sar. P.C.J. 660 ... 672

(4) *Erroneous order—Civ. Pro. Code, s. 610, function of Court under—Receiver, lien of, on estate.*—On receiving and filing under s. 610 of the Civ. Pro. Code, an order of Her Majesty in Council made on appeal from an order or decree of the Court of original instance, the latter Court performs a function which is purely ministerial. The effect of the order, however erroneous, on the suit itself cannot be discussed on an application to receive and file it. A receiver, however, who is divested by such order, has a lien on the estate for his claims and allowances. *Semble*—The proper course for the party aggrieved by the order is to apply to Her Majesty in Council to make the necessary alteration or modification in such order. PREMLALL MULLICK v. SUMBOONATH ROY, 22 C. 960 ... 637

(5) See SANCTION FOR PROSECUTION, 22 C. 487.

Appealable Value.

Reduction of claim below—See APPEAL TO PRIVY COUNCIL, 22 C. 434.

Appellate Court.

(1) Effect of decree of—See ACT I OF 1879 (CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE), 22 C. 467.

(2) Power of, in disposing of Criminal Appeal—See ACQUITTAL, 22 C. 377.

Application.

(1) For effecting partition—See PARTITION, 22 C. 425.

(2) For leave to appeal—See APPEAL TO PRIVY COUNCIL, 22 C. 928.

(3) For order absolute for sale of mortgaged property—See LIMITATION ACT (XV OF 1877), 22 C. 924.

(4) For return of partially executed decree—See LIMITATION ACT (XV OF 1877), 22 C. 827.

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(5) For transfer of decree—See LIMITATION ACT (XV OF 1877), 22 C. 375.

(6) To receive poundage fee—See LIMITATION ACT (XV OF 1877), 22 C. 827.

(7) To revive suit—See ABATEMENT, 22 C. 92.

(8) To set aside sale of a tenure by a purchaser from the judgment debtor prior to attachment—See SALE, 22 C. 802.

(9) To vary decree—See PRACTICE, 22 C. 100.

(10) Within reasonable time—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 384.

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Evidence of—See PARDON, 22 C. 50.

Arrangement.

Between widow and reversioner—See HINDU LAW (REVERSIONER), 22 C. 354.

Arrears of Rent.

Latest day for payment of—See SALE, 22 C. 738.

Arrest.

Escape from—See PENAL CODE (ACT XLV OF 1860), 22 C. 759.

Assessment.

Of costs—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 384.

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(1) By order of Civil Court—See SALE, 22 C. 738.

(2) Of property, Order for—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 297.

(3) See SALE, 22 C. 909.

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By witnesses—See STAMP ACT (I OF 1879), 22 C. 757.

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(1) Improper conduct of—See RECEIVER, 22 C. 648.

(2) Taxed costs of—See LIMITATION ACT (XV OF 1877), 22 C. 943.

Bandhus.

See HINDU LAW (INHERITANCE), 22 C. 339.

Benami Transaction.

Notice of—See SALE, 22 C. 909.

Bengal School of Law.

See HINDU LAW (INHERITANCE), 22 C. 317.

Bond.

(1) Condition in, Unfulfilled—See MESNE PROFITS, 22 C. 434.

(2) See STAMP ACT (I OF 1879), 22 C. 757.

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Suits in, on judgments and decrees of Courts of Foreign States—See FOREIGN COURT, 22 C. 222.

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On land—See LAND ACQUISITION ACT (X OF 1870), 22 C. 820.

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Definition of—See PENAL CODE (ACT XLV OF 1860), 22 C. 457.

Burden of Proof.

(1) *Hindu law—Joint family—Evidence as to the continuance of the joint holding of property—Inheritance and survivorship under the Mitakshara Law.*—A daughter in the absence of sons claimed to inherit, after the deaths of her father's widows, estate which she alleged to have belonged to him separately. This estate had been at one time in his possession jointly with his only brother, they having been members of a joint family under the Mitakshara law. On the death of one of the brothers, who died before the claimant's father leaving sons, the latter became entitled thereto jointly with the survivor. In order to establish this claim to inherit her father's share on his subsequent death, it was held that it was for her to adduce evidence that there had been a separation between her father and his co-sharer, or co-sharers. As the evidence, stood, the inference was that the previous joint holding had continued till her father's death. PRIT KOER v. MAHADEO PERSHAD SINGH, 22 C. 85 (P. C.) = 21 I.A. 134 = 6 Sar. P.C.J. 485 ... 59

(2) Of guilty intention.—See PENAL CODE (ACT XLV OF 1860), 22 C. 164.

(3) See LANDLORD AND TENANT, 22 C. 742.

(4) See REGULATION III OF 1872 (SONTHAL PERGUNNAHS SETTLEMENT), 22 C. 473.

Butwara Proceedings.

Power of Amin to measure lands in—See ACT VIII OF 1876 (ESTATES PARTITION, BENGAL), 22 C. 286.

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In which appeal lies to Privy Council from Recorder of Rangoon—See SANCTION FOR PROSECUTION, 22 C. 487.

Cause of Action.

(1) Decree on a cause of action not stated—See HINDU LAW (WIDOW), 22 C. 589.

(2) Meaning of—See MISJOINDER, 22 C. 833.

(3) See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 480.

(4) See JURISDICTION, 22 C. 451, 551.

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Of Municipality, jurisdiction of—See MUNICIPAL ELECTION, 22 C. 717.

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(1) Conviction without formal charge—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 22 C. 1006.

(2) Error in, misleading accused—See RIOTING, 22 C. 276.

(3) For maintenance created by decree—See EXECUTION OF DECREE, 22 C. 903.

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(4) On property how enforced—See EXECUTION OF DECREE, 22 C. 859, 903.

(5) Specification of intention in—See CRIMINAL TRESPASS, 22 C. 391.

(6) Statement of common object of assembly in—See RIOTING, 22 C. 276.

(7) See CO-SHARERS, 22 C. 800.

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Chowkidari Tax.

Village Chowkidars Act (*Bengal Act* VI *of* 1870)—*Suit for arrears of chowkidari tax payable by putnidar under putni settlement—Abwab—Rent—Bengal Tenancy Act* (*Act* VIII *of* 1885), ss. 3 (5), 74—*Regulation* VIII *of* 1793, *ss* 54, 55—*Regulation* V *of* 1812, *s.* 3—*Bengal Act* VIII *of* 1869, *ss.* 11—*Second Appeal—Civil Procedure Code* (*Act* XIV *of* 1882), *s.* 586.—In a suit for arrears of chowkidari tax, payable by the *putnidar* under the *putni* settlement, the defence was that it was an illegal cess, and could not be legally recovered. *Held*, that as the payment of the chowkidari tax was one of the terms of the *putni* settlement itself which was entered into between parties competent to contract, and was made for valuable consideration, and the *putni* regulation declares that *putni taluks* "shall be deemed to be valid tenures in perpetuity according to the terms of the engagements under which they are held;" and, moreover, as the amount which the *putnidar* agrees to pay as chowkidari tax is paid quite as much on account of the occupation of the property as that which is expressly called the rent, and is part of the ground rent quite as much as the latter, it is not an *abwab* and is therefore recoverable. *Held*, also (upon the objection of the respondents, that the suit being one of the nature cognizable by a Small Cause Court and valued at less than Rs. 500, no second appeal would lie under section 586 of the Code of Civil Procedure), that as the consideration for the payment of the chowkidari tax is the occupation or the holding of the *putni* tenure, and as the payment is to be made periodically to the zemindar by the *putnindar*, and the amount agreed to be paid is lawfully payable, it comes within the definition of rent in the Bengal Tenancy Act, and, therefore, a second appeal would lie. ASSANULLA KHAN BAHADUR *v.* TIRTHABASHINI, 22 C. 680 ... 453

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(1) See PRACTICE, 22 C. 511.

(2) Ss. 13 and 43—See RES JUDICATA, 22 C. 692.

(3) S. 25—See JURISDICTION, 22 C. 871.

(4) S. 26—See MISJOINDER, 22 C. 833.

(5) S. 53—See IMMOVEABLE PROPERTY, 22 C. 752.

S. 53—See RES JUDICATA, 22 C. 692.

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(7) S. 85—See PRACTICE, 22 C. 889.

(8) Ss. 102, 103—*Suit brought by next friend of minor and struck off for default of appearance—Gross negligence on the part of next friend—English rule of law—Law of equity and good conscience*—Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in s. 103 of the Civil Procedure Code to the institution of a fresh suit by such person when the disability has ceased. Where a suit for certain property was brought on behalf of two minors by their next friend, and, owing to the gross want of care and diligence on the part of the next friend, the suit was struck off under s. 102 for default of appearance: *Held* in a suit afterwards brought by the same plaintiffs on attaining their majority, that the suit was not barred by s. 103 of the Code. The English rule of law on this point as being the law of equity and good conscience was applied by the Court to this case, in the absence of any statutory provision. LALLA SHEO CHURN LAL *v.* RAMNANDAN DOBEY, 22 C. 8 ... 7

(9) S. 108—See APPEAL (GENERAL), 22 C. 981.

(10) S. 115—See WRITTEN STATEMNT, 22 C. 268.

(11) Ss. 129, 136—See PRACTICE, 22 C. 891.

(12) S. 223—See EXECUTION OF DECREE, 22 C. 764.

(13) S. 223—See LIMITATION ACT (XV OF 1877), 22 C. 375, 827.

(14) Ss. 223, 230, 248—See LIMITATION ACT (XV OF 1877), 22 C. 921.

(15) S. 226—See EXECUTION OF DECREE, 22 C. 764.

(16) S. 230—See LIMITATION ACT (XV OF 1877), 22 C. 921.

(17) Ss. 234, 249—See EXECUTION OF DECREE, 22 C. 558.

(18) S. 244—See EXECUTION OF DECREE, 22 C. 903.

(19) S. 244—See RIGHT OF SUIT, 22 C. 501.

(20) S. 244—See SURETY, 22 C. 25.

(21) *S. 244—Suit for property wrongly taken in execution of decree—Right of suit—Jurisdiction—Procedure.*—Under section 244 of the Civil Procedure Code (Act XIV of 1882), no separate suit will lie for the recovery of lands taken by the decree holder in excess of the terms of his decree, if the decree-holder has been put in possession of such lands by the officer of the Court executing the decree. But where the suit has been instituted in the Court which had jurisdiction to execute the decree, the plaint may be regarded as an application to that Court for determining the question whether the lands are covered by the decree, and the suit does not therefore fail for want of jurisdiction. *Held*, also, that in such a case, it is incumbent upon the defendant to raise the plea of jurisdiction in the Court of first instance, the question being not a pure question of law, but a question which would depend upon facts. BIRU MAHATA v. SHYAMA CHURN KHAWAS, 22 C. 483 ... 323

(22) S. 248—See EXECUTION OF DECREE, 22 C. 558.

(23) S. 248—See LIMITATION ACT (XV OF 1877), 22 C. 921.

(24) S. 251—See PENAL CODE (ACT XLV OF 1860), 22 C. 596.

(25) S. 252—See REPRESENTATIVE, 22 C. 259.

(26) S. 253—See SURETY, 22 C. 25.

Civ. Pro. Code (Act XIV of 1882)—(*Continued*). PAGE.

(27) *S. 310A—Civ. Pro. Code, Amendment Act* (V *of* 1894)—*Construction of Statute—Effect of Act not creating new rights—Execution of decree—Sale in execution of decree held after Act* V *of* 1894 *came into operation, the execution proceedings being commenced before—General Clauses Consolidation Act* (I *of* 1868)—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 174—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622.—On the 8th February 1894, a decree was obtained against *A* and others in the Small Cause Court of Calcutta, and was subsequently transferred to one *J* who was substituted in the place of the original decree-holder. On 26th July *J* applied in the Small Cause Court for execution of the decree, and on the same date the decree was transferred for execution to the District Court of Bankura. On the 3rd August a writ of attachment issued, and on the 5th it was served. Sale proclamation issued on the 11th, and was served on the 14th August, and on the 20th September the sale took place. On the 27th September 1894, the judgment-debtor applied under s. 310A of the Code of Civil Procedure, which section became part of the Code under the provisions of Act V of 1894 passed on the 2nd March 1894, to have the sale set aside. The District Judge relying upon the case of 21 C. 940, together with the principle enunciated in the cases of 14 C. 636, and 15 C. 383, rufused to set it aside, on the ground that s. 310A was not a mere matter of procedure, and Act V of 1894 had no retrospective effect, and therefore s. 310A was not applicable to proceedings in execution of a decree which had been passed before that section came into operation. In an application under s. 622 of the Civ. Pro. Code to set aside this decision as wrong: *Held* by the Full Court that the decision in 14 C. 636, so far as it holds that s. 174 of the Bengal Tenancy Act creates a new right in a judgment-debtor, and is therefore inapplicable to a case in which the decree was passed before that Act became law, is wrong. The cases of 15 C. 383 and 21 C. 940, which are based upon the same principle, are also wrongly decided. *Quære.*—Whether the decision in 14 C. 636 was correct under s. 6 of the General Clauses Act by reason of execution proceedings having been commenced under Bengal Act VIII of 1869, an Act repealed by the Bengal Tenancy Act? That question did not arise in the present case, for though the execution proceedings were instituted under the old law, the case is unaffected by s. 6 of the General Clauses Act, as the change in the law was brought about, not by the repeal of the old Act, but by the addition to it of a new s. 310A. *Held*, therefore, that s. 310A was applicable to the proceedings in execution in the present case, and in that view the Court below was bound, upon the application of the judgment-debtor, to set aside the sale, and not having done so, it had failed to exercise jurisdiction within the meaning of s. 622 of the Code. The Court had power therefore to interfere under that section. JOGODANUND SINGH *v.* AMRITA LAL SIRCAR, 22 C. 767 (F.B.) ... 509

(28) Ss. 311, 312—See SALE, 22 C. 802.

(29) S. 313—See SALE, 22 C. 565.

(30) S. 331—See APPEAL (GENERAL), 22 C. 830.

(31) Ss. 361, 362, 365, 371—See ABATEMENT, 22 C. 92.

Civ. Pro. Code (Act XIV of 1882)—(*Concluded*). PAGE

(32) S. 396—See PARTITION, 22 C. 425.

(33) Ss. 431, 434—See FOREIGN COURT, 22 C. 222.

(34) S. 435—See WRITTEN STATEMENT, 22 C. 268.

(35) Ss. 440, 464—See RIGHT OF SUIT, 22 C. 729.

(36) S. 451—See PRACTICE, 22 C. 270.

(37) *Ss.* 492 *and* 503—*Receiver, Appointment of—Temporary injunction.*—The distinction between a case in which a temporary injunction may be granted and a case in which a Receiver may be appointed, is that, while in either case it must be shown that the property should be preserved from waste or alienation; in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *prima facie* title has to be made out. An order of the lower Court for appointment of a Receiver under s. 503 of the Civ. Pro. Code (Act XIV of 1882) was set aside, and an order for a temporary injunction under s. 492 of the Code, granted. CHANDIDAT JHA v. PADMANAND SINGH BAHADUR, 22 C. 459 ... 307

(38) S. 566—See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 22 C. 419.

(39) S. 578—See EXECUTION OF DECREE, 22 C. 558.

(40) S. 583—See RIGHT OF SUIT, 22 C. 501.

(41) S. 586—See CHOWKIDARI TAX, 22 C. 680.

(42) Ss. 586, 588—See APPEAL (GENERAL), 22 C. 734.

(43) S. 591—See APPEAL (GENERAL), 22 C 734.

(44) S. 595—See APPEAL (TO PRIVY COUNCIL), 22 C. 928.

(45) S. 608 (*c*)—See PRIVY COUNCIL, 22 C. 1.

(46) S. 610—See APPEAL (TO PRIVY COUNCIL), 22 C. 960.

(47) S. 622—See SALE, 22 C. 802.

(48) S. 622—See SMALL CAUSE COURT, 22 C. 784.

(49) S. 629—See APPEAL (GENERAL), 22 C. 3, 734, 984.

Civ. Pro. Code, Amendment Act (V of 1894).

See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 767.

Claim.

(1) By third party to distrained property—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 935.

(2) Not antagonistic—See MISJOINDER, 22 C. 833.

(3) Reduction of (by abandonment of portion) below prescribed limit—See APPEAL (TO PRIVY COUNCIL), 22 C. 434.

Collector.

Suit against, as Agent of Court of Wards—See RIGHT OF SUIT, 22 C. 729.

Commitment.

Crim. Pro. Code (Act X of 1882), ss. 195, 478—*Forged document filed in Court—Order of commitment for trial—"Any such offence" in s.* 478, *Meaning of.*—Certain documents were filed annexed to a petition in a suit pending before a Munsif, but were not given in evidence. The Munsif, on suspicion that they had been tampered with, held an enquiry and committed the petitioners for trial by the

Commitment—(*Concluded*). PAGE

Court of Session. *Held*, that it was a proper commitment under s. 478 of the Crim. Pro. Code. The words "any such offence" in that section mean an offence referred to in s. 195 of the Code and not an offence referred to in that section qualified by the circumstances under which it is committed. AKHIL CHANDRA SEN v. THE QUEEN-EMPRESS, 22 C. 1004 ... 667

Committee in lunacy.

Under Act XXXV of 1858, Mortgage by—See HINDU LAW (INHERITANCE), 22 C. 864.

Common Object.

(1) See RIOTING, 22 C. 276.

(2) See UNLAWFUL ASSEMBLY, 22 C. 306.

Company.

Principal Officer of Corporation or—See WRITTEN STATEMENT, 22 C. 268.

Compensation.

(1) Award of—See SANCTION FOR PROSECUTION, 22 C. 586.

(2) Imprisonment in default of payment of—See SANCTION FOR PROSECUTION, 22 C. 586.

(3) Omission from notice of requisition on tenant to pay—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 77.

(4) Suit for—See LAND ACQUISITION ACT (X OF 1870), 22 C. 820.

(5) See ACT I OF 1871 (CATTLE TRESPASS), 22 C. 139.

Concurrent Judgments.

On facts—See LIMITATION ACT (XV OF 1877), 22 C. 609.

Conditional Pardon.

To prisoner—See PARDON, 22 C. 50.

Confession.

(1) Admissibility of, in evidence—See PENAL CODE (ACT XLV OF 1860), 22 C. 164.

(2) After retractation, Value of—See PENAL CODE (ACT XLV OF 1860), 22 C. 164.

(3) *Crim. Pro, Code (Act X of 1882), s. 364—Confession not recorded in language in which it is given, Admissibility of, in evidence—Unsoundness of mind—Penal Code (Act XLV of 1860), s. 84.*—The confession of an accused person made in Bengali, the language in which the accused was examined, was recorded in English. The committing Magistrate, in his evidence in Court, said that he could not write Bengali well, and that there was no *mohurrir* with him at the time when the confession was recorded. *Held*, the provisions of s. 364 of the Crim. Pro. Code had been sufficiently complied with. Where the unsoundness of mind deposed to was not such as would make the accused incapable of knowing the nature of the act, or that he was doing what was contrary to law, it was held to be insufficient to exonerate him from responsibility for crime under s. 84 of the Penal Code. QUEEN-EMPRESS v. RAZAI MIA, 22 C. 817 ... 541

Consent Decree.

(1) See EXECUTION OF DECREE, 22 C. 859.

(2) See EXECUTOR, 22 C. 14.

Consolidation. PAGE

Of salvage claims—See PRACTICE, 22 C. 511.

Contempt of Court.

See RECEIVER, 22 C. 648.

Contract.

(1) Against minor, Suit to enforce—See SPECIFIC PERFORMANCE, 22 C. 545.

(2) By guardian with sanction of Court—See SPECIFIC PERFORMANCE, 22 C. 545.

(3) See EXECUTOR, 22 C. 144.

Contract Act (IX of 1872).

(1) S. 23—See EXECUTOR, 22 C. 14.

(2) Ss. 69, 70—See VOLUNTARY PAYMENT, 22 C. 28.

(3) *S. 74—Penalty—Suit by a joint proprietor for arrears of rent—Bengal Tenancy Act* (VIII *of* 1885), *s.* 29 (*b*), *Kabuliat executed prior to —Covenant for a higher rate—Bengal Act* (VIII *of* 1869), *s.* 5. In a *kabuliat* executed in 1881, it was stipulated that, upon the expiry of the term of seven years fixed therein, a fresh lease should be executed; that should the defendant cultivate the lands without executing a fresh *kabuliat* he would pay rent at the rate of Rs. 4 a bigha (a rate much higher than that fixed for the term). No fresh *kabuliat* was executed on expiry of the term, and the plaintiff, a part proprietor, collecting rent separately, brought this suit for arrears of rent at the new rate of Rs. 4. The defendant objected *inter alia* that the plaintiff being a part proprietor was not entitled to sue for enhanced rent, and that the stipulation for the higher rate was a mere threat, and not intended to be carried out. The first Court gave a decree at an enhanced rate, or an addition of 2 annas in the rupee in terms of s. 29 (*b*) of the Bengal Tenancy Act. On appeal, the Subordinate Judge dismissed the whole suit, on the ground that the suit being one for enhanced rent, and the plaintiff a part proprietor, the suit did not lie. *Held*, that the *kabuliat* having been executed before the Bengal Tenancy Act was passed, the present case did not come within the operation of that Act, and the plaintiff, although a part proprietor, could bring this suit. *Held* by PRINSEP and GHOSE, JJ. (RAMPINI, J., dissenting)—That the additional rent was intended to be enforceable only on default to execute a fresh *kabuliat*, and the so-called agreement to pay at the enhanced rate of Rs. 4 was in the nature of a penalty. *Held* by RAMPINI, J.—The plea that the rate of Rs. 4 was a penalty was not taken by the defendant in his written statement, and, in any case, the stipulation did not come within the purview of s. 74 of the Indian Contract Act, and the suit was not for compensation for breach of contract, but for rent at a rate which the defendant had agreed to pay from a certain time. *Held*, also, that s. 29 (*d*) of the Bengal Tenancy Act had no retrospective effect, and did not apply to the present *kabuliat* which was executed before the passing of that Act; and that s. 5 of Bengal Act VIII of 1869, which would be the law

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applicable, did not debar an agreement by an occupancy ryot to pay whatever rate he pleased. TEJANDRA NARAIN SINGH v. BAKAI SINGH, 22 C. 658 ... 439

(4) S. 74—See INTEREST, 22 C. 143.

Contribution.

Suit for, against Hindu widow by a co-defendant—See HINDU LAW (WIDOW), 22 C. 974.

Conviction.

Sentence—Discretion of Court as to punishment after conviction of murder—Opinion of committing Magistrate, Reference to, by Sessions Judge in his judgment.—The law gives no discretion to a Court which convicts of an offence to award or not the punishment provided for that offence in the Penal Code. When convicting of murder, the only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded, regard being had to the circumstances of the particular case. On a case, the decision of which is vested by law in him sitting with assessors, a Sessions Judge is bound to form his own opinion, aided by the assessors indeed, but quite independent of any expression of opinion on the part of the committing Magistrate. The Judge's reference in his judgment to the opinion of the committing Magistrate was held to be wholly irrelevant and wrong. DEWAN SINGH v. THE QUEEN-EMPRESS, 22 C. 805 ... 533

Corporation.

Verification by—See WRITTEN STATEMENT, 22 C. 268.

Co-sharers.

Bengal Tenancy Act (VIII of 1885), ss. 171, 174—Payment of decretal amount by one co-sharer to set aside sale, Effect of—Charge.—Where the plaintiffs and defendants were co-tenants of certain *jotes* which were sold by auction in execution of a decree for rent, and the plaintiffs, by paying the decretal amount and auction-purchaser's fees under s. 174, Bengal Tenancy Act, had the sale set aside, *held*, that the plaintiffs did not by such payment acquire a charge on the shares of their defaulting co-tenants. GOPI NATH BAGDI v. ISHUR CHUNDRA BAGDI, 22 C. 800 ... 530

Costs.

(1) Assessment of, by Magistrate other than Magistrate who passed decision and order for costs—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 384.

(2) Decree for—See RIGHT OF SUIT, 22 C. 501.

(3) Order for, in Criminal case—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 387.

(4) Suit for—See LIMITATION ACT (XV OF 1877), 22 C. 943.

Court.

(1) Discretion of, as to sentence—See CONVICTION, 22 C. 805.

(2) Function of, under s. 610 of Civ. Pro. Code—See APPEAL (TO PRIVY COUNCIL), 22 C. 960.

Court Fees Act (VII of 1870). PAGE

(1) S. 7—See RES JUDICATA, 22 C. 692.

(2) See PENAL CODE (ACT XLV OF 1860), 22 C. 596.

Court of Wards.

Suit against Collector as Agent of—See RIGHT OF SUIT, 22 C. 729.

Covenant.

For higher rate of rent—See CONTRACT ACT (IX OF 1872), 22 C. 658.

" Cow."

Definition of—See PENAL CODE (ACT XLV OF 1860), 22 C. 457.

Creditor.

Removal by, of debtor's property—See THEFT, 22 C. 669, 1017.

Criminal Appeal.

Judgment in—See JUDGMENT, 22 C. 241.

Criminal Breach of Trust.

Penal Code, ss. 408, 463, 464, 467, *and* 471—*Criminal breach of trust by a servant—Forgery—* " *Dishonestly* "—" *Fraudulently*"—*Fabrication of a document to conceal a contemporaneous or past embezzlement.*- An accused person who was in the service of zemindars, and whose duty it was to pay into the Collectorate Government revenue due in respect of their estates, immediately before the due date of a *kist* received from them a certain sum of money with no specific instruction as to its application. On receipt of that money he paid a portion only of it into the Collectorate on account of the revenue, and having done so, he then altered the *challan* given back to him showing the amount actually paid, and made it appear that a much larger amount had been paid in than was the fact. This *challan* he sent to his employer for the purpose of showing the application of the money. He was charged (1) with criminal breach of trust as a servant (s. 408 of the Penal Code) in respect of the difference between the amount actually paid into the treasury and the amount shown to have been paid in by the altered *challan*; (2) with forgery (s. 467) in respect of the *challan*; and (3) with using a forged document (s. 471) in respect of the same document. The accused was convicted on all these charges. It was contended (*a*) that the charge under s. 408 was not sustainable, inasmuch as the money was not alleged to have been sent to the accused for the specific purpose of paying the Government revenue, and that the accounts between him and his employers had not been adjusted, and that it was not shown whether at the date of the alleged breach of trust the accused was indebted to his employer or the reverse; (*b*) that the charges under ss. 467 and 471 were bad, as there was no evidence to support them, and even admitting the alteration of the *challan*, such alteration did not come within the term " forgery " as used in the Penal Code, not having been made with the intention of causing any wrongful gain or wrongful loss, but with the intention of screening the offence of criminal breach of trust which had been previously committed. *Held*, that as the money was sent to the accused immediately before the *kist* day, and the *challan* was sent to the employers showing in its altered state the amount really payable as revenue which nearly covered the whole

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amount remitted, it was reasonable to infer that the accused was aware of the implied purpose for which the money was remitted, and as he deposited a very much smaller amount than that remitted, and tried to pass off the altered *challan* as genuine, there was a dishonest misappropriation of the difference sufficient to constitute the offence under s. 408. *Held*, further, that it is not necessary for the purpose of constituting the offence of forgery that the false document should be made with the intention of committing a fraud or dishonesty in the future, and that if the intention with which a false document is made be to conceal a fraudulent act which has been previously committed, the intention cannot be other than to commit fraud, and the offence of forgery as defined in s. 463 is committed. The word "fraudulently" as used in s. 464 must not be taken as being the same as "dishonestly" and implying wrongful gain or wrongful loss, but must be taken to mean as "with intent to defraud." *Held*, therefore, that upon the facts of the case there was ample evidence to show that the accused had abetted the forgery of the *challan* and had used the sum, and that he had been properly convicted of all the offences charged against him except that of the actual forgery, and that he should have been convicted of abetment of that offence. LOLIT MOHUN SARKAR v. QUEEN-EMPRESS, 22 C. 313 ... 210

Crim. Pro. Code (Act X of 1882).

(1) *S. 145—Power of a District or Sub-Divisional Magistrate to transfer or withdraw cases—Crim. Pro. Code, ss. 192 and 528, their applicability to proceedings under s. 145.*—A proceeding under Ch. XII of the Crim. Pro. Code is an "enquiry" within the meaning of s. 4 of the Code. The general power conferred by ss. 192 and 528 of the Code upon a District or Sub-Divisional Magistrate to transfer or withdraw any case for enquiry or trial by any Magistrate subordinate to him, is not taken away or cut down by anything in s. 145. The words of s. 192 are wide enough to include cases under Ch. XII. SATISH CHANDRA PANDAY v. RAJENDRA NARAIN BAGCHI, 22 C. 898 ... 595

(2) *Ss. 145, 146—Possession, enquiry as to—Time at which Magistrate is to determine who was in possession—Order passed under s. 146, on proceedings taken under s. 145, Crim. Pro. Code—Attachment of property.*—In setting aside an order passed by a Magistrate under s. 145 of the Code of Criminal Procedure, the High Court has power itself to pass such order as should have been made by the Magistrate in the case. It is impossible to lay down any hard and fast rule which may be applicable to all cases as to the exact point of time to which an enquiry under s. 145 must be directed, and the time at which possession must be found in one party or the other must be governed by the facts of each particular case. To hold that the Magistrate is precluded from enquiring into anything before the date when he actually commenced his own proceedings might in some cases lead to a person who has been acting in an unwarrantable manner misusing the process of the law to enable him to carry out a high-handed and improper scheme, which could never have been the intention of the Legislature. In a proceeding under s. 145 regarding a dispute between two parties

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concerning certain collieries, it appeared that the first party were certainly in possession of the buildings which contained the office where the business of the collieries was transacted, and where all the cash books and papers of the business were kept, and that the second party had, during a period of about fourteen days prior to the commencement of the proceedings, succeeded in obtaining possession of the pits, wharves, tramways, etc., of the colliery by what the Court considered to be a high-handed and improper scheme and acting in an unwarrantable manner. The Magistrate, considering himself bound to find who was in actual possession at the date of the commencement of the proceedings by himself, passed an order in favor of the second party. *Held*, that such order was bad, and that as the second party was undoubtedly not in possession of the whole of the property in dispute, and the effect of it was to place them in possession of the portion that was in the possession of the first party, the proper order to make under such circumstances was one under s. 146 attaching the property. KATRAS JHERRIAH COAL COMPANY v. SIBKRISHTA DAW & COMPANY, 22 C. 297 ... 199

(3) *S.* 148, *para* 3—*Assessment of costs by Magistrate other than the Magistrate passing the decision and making the order for costs—Application within reasonable time.*—Where a decision has been given in a case under s. 145 of the Crim. Pro. Code, and an order for costs has been made at the same time and by the same Magistrate, there is no objection to the amount of such costs being afterwards assessed by a different Magistrate if an application for that purpose is made to him within a reasonable time. GIRIDHAR CHATTERJEE v. EBADULLAH NASKAR, 22 C. 384 ... 257

(4) *S.* 148, *para* 3—"*Magistrate passing a decision*," *meaning of—Order for costs.*—The award of costs under s. 148 of the Code of Criminal Procedure is a *quasi* civil proceeding, and should be made by the Magistrate at the time of passing his decision under s. 145, in the same manner as under s. 218 of the Code of Civil Procedure the order for costs of any application should be made when the application is disposed of. Where, however, the decision under s. 145 was passed on 19th December 1893, and the application for costs was made on 21st December, but owing to delay arising from the action of the objectors, the order for costs was not made until 16th June 1894, but then by the same Magistrate who passed the order under s. 145: *Held*, that the order was not void for want of jurisdiction, and, there being no suggestion that it was unjust or improper on the merits, the Court declined to interfere with it in the exercise of their discretionary power of revision under s. 439. BINODA SUNDARI CHOWDHURANI v. KALI KRISTO PAL CHOWDHURY, 22 C. 387 ... 259

(5) S. 162—See PARDON, 22 C. 50.

(6) S. 193—See PARDON, 22 C. 50.

(7) S. 195—See COMMITMENT, 22 C. 1004.

(8) S. 195—See SANCTION FOR PROSECUTION, 22 C. 176, 487, 573, 586.

(9) S. 225—See RIOTING, 22 C. 276.

(10) S. 236—See ACQUITTAL, 22 C. 377.

Crim. Pro. Code (Act X of 1882)—(*Concluded*). PAGE

(11) *Ss. 238 and 307—"Minor offence," conviction of, without formal charge—Penal Code (Act XLV of 1860), ss. 365, 366, 376.*—An offence under s. 365 of the Penal Code is, within the meaning of s. 238 of the Crim. Pro. Code, a minor offence as compared with offences under s. 366 and s. 376 of the Penal Code ; and the High Court, in dealing with a case under s. 307 of the Crim. Pro. Code, can convict an accused of the former offence without a formal charge having been framed. *Per* BANERJEE, J.—The words "minor offence" have not been defined by law ; they are to be taken not in any technical sense, but in their ordinary sense. QUEEN-EMPRESS v. SITANATH MANDAL, 22 C. 1006 ... 668

(12) Ss. 337, 339—See PARDON, 22 C. 50.

(13) S. 364—See CONFESSION, 22 C. 817.

(14) S. 367—See JUDGMENT, 22 C. 241.

(15) S. 374—See PARDON, 22 C. 50.

(16) *S. 386—Distress warrant—Claim by third party to the property distrained.*—A Magistrate, who has issued a distress warrant under s. 386 of the Crim. Pro. Code, is not required by law to try any claim which may be preferred to the ownership of the property distrained. QUEEN-EMPRESS v. GASPER, 22 C. 935 ... 620

(17) S. 386—See ACT I OF 1871 (CATTLE TRESPASS), 22 C. 139.

(18) Ss. 402, 423—See ACQUITTAL, 22 C. 377.

(19) S. 424—See JUDGMENT, 22 C. 241.

(20) Ss. 437, 438—See SANCTION FOR PROSECUTION, 22 C. 573.

(21) S. 439—See CRIMINAL TRESPASS, 22 C. 391.

(22) S. 439—See REVISION, 22 C. 998.

(23) S. 473—See COMMITMENT, 22 C. 1004.

(24) S. 488—See HINDU LAW (MAINTENANCE), 22 C. 291.

(25) *S. 523—Seizure of property on suspicion—Order by the Magistrate.*—By the provisions of s. 523 of the Code of Criminal Procedure, it is not intended that any final steps should be taken by the Magistrate, nor is he bound to take any final steps to ascertain whether the property seized on suspicion belongs to the person in whose possession it was found, until after the expiry of the six months mentioned in the section ; but when the proclamation has been issued, and the six months have expired, then under the provisions of s. 524, the person in whose possession the property was found can come forward and show that it is his own. QUEEN-EMPRESS v. MAHALABUDDIN, 22 C. 761 ... 505

(26) S. 537—See CRIMINAL TRESPASS, 22 C. 391.

(27) S. 537—See SANCTION FOR PROSECUTION, 22 C. 176.

(28) S. 560—See SANCTION FOR PROSECUTION, 22 C. 586.

Criminal Trespass.

(1) *House trespass—Possession of property the subject of criminal trespass—Penal Code, ss. 441, 447 and 448.*—C, a ratepayer in a municipality, who had filed a petition against an assessment which in his absence had been dismissed, entered a room where a Committee of the Municipal Commissioners were seated hearing and deciding petitions in assessment matters, ostensibly with the object of presenting a petition for the revision of his assessment. The Chairman of the Committee ordered him to leave the room, and on his

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refusal to do so, he was turned out. Outside the room in the verandah he addressed the crowd complaining that no justice was to be obtained from the Committee. *C* was prosecuted on these facts at the instance of the Chairman of the Committee and convicted of house trespass under s. 448 of the Penal Code. *Held*, that the conviction was wrong, and that no offence had been committed. The prosecution was bound to prove, in order to support a conviction of a charge under s. 441, or 442, that the property trespassed upon was at the time in the possession of a complainant who could compound the offence under s. 345 of the Code of Criminal Procedure, and the complainant had failed to prove that the room was in his possession, and had in fact shown that he was merely sitting in it with other persons at the invitation and with the consent of the person, whoever he might be, who had the immediate right to such possession. *Held*, further, that even if the complainant could be held to be in possession of the room, there was no evidence of any intent to commit an offence or to intimidate, insult, or annoy any person, it appearing that the object of the accused in going into and remaining in the room was to endeavour to induce the complainant and his colleagues to reconsider their decision, the verbal insult on which the conviction was based having been uttered after *C* had left the room. CHANDI PERSHAD v. EVANS, 22 C 123 ... 83

(2) *Penal Code* (*Act* XLV *of* 1860), *ss.* 441, 456, 457, 509—*Lurking house trespass by night—Intention—Charge, Specification of intention in—Revision, powers by High Court in—Crim. Pro. Code* (1882), *ss.* 221, 222, 439, 537.—A conviction for lurking house trespass by night under s. 456 of the Penal Code is not bad for want of the specification of the intention in the charge, but one under s. 457 cannot be sustained without such specification. In a charge under the former section, though a guilty intention must be proved, it is not necessary to prove which of the several guilty intentions the accused had; it will be enough if it is shown that the intention must have been one or other of those specified in s. 441, though it may not be certain which it was. An accused person, the landlord of a house in which he occupied the lower flat, was found in the middle of the night in the room of the complainant, one of his tenants, upstairs, in which the complainant and his wife were at the time sleeping. Upon being detected the accused was subjected to very severe treatment, but did not utter a word of protestation of innocence or make any show of remonstrance, and when questioned said: "I have committed a fault, pardon me." He was arrested upon a charge under s. 456 of the Penal Code, the criminal intention alleged being that of committing theft. The charge framed by the Magistrate did not specify any intention, and the Magistrate came to the conclusion that the trespass was not committed by the accused, who was a wealthy man, with that intention. He found, however, that the complainant had suppressed some important facts, and that he was not in his wife's room when the accused entered it and relying on the decision in 16 C 657, he convicted the accused. On appeal the Sessions Judge, though finding that the Magistrate's views were against the evidence, upheld the conviction without finding what specifically

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was the intention with which the entry was made. In revision it was contended that the conviction was bad—(1) because no guilty intention was set out in the charge; (2) because no such intention was proved by the evidence; and (3) because no such intention was specifically found by the Sessions Judge. *Held*, that the first contention was unsupportable for the reasons above stated. Even if it had been necessary to specify the intention in the charge, it would have to be shown under the provisions of s. 537 of the Code of Criminal Procedure that the omission had occasioned a failure of justice, and having regard to the nature of the charge and the line of defence adopted, the accused had not in any way been prejudiced in his defence. *Held*, as regards the second contention that, though it was not certain what the precise intention of the accused was in committing the trespass, it was clear that it must have been with one or other of the intentions specified in s. 441 of the Penal Code, as, judging from the time, the place, and manner, in which the trespass was committed and the conduct of the accused when discovered, it was impossible to suppose that the trespass could have been committed either unintentionally or with any innocent intention, and that it must have been committed with the intention of committing some offence, but that the accused was entitled to have it taken that it was with the least possible culpable intention, namely, an offence under s. 509 of the Penal Code. *Held*, as regards the third contention that, in exercising its powers under s. 439 of the Code of Criminal Procedure, it is open to the High Court to alter any finding and confirm a conviction, and that if the evidence on the record in a case be sufficient to warrant a conviction, the Court would not be justified in setting such conviction aside, merely because the view taken of the evidence by the lower Court is not sustainable, or some fact which ought to have been found by that Court is not found or found incorrectly. BALMAKAND RAM *v.* GHANSAMRAM, 22 C. 391 262

(3) *Penal Code* (*Act* XLV *of* 1860), *ss.* 441 *and* 456 *and* 509—*House-breaking by night—Intent—Intrusion upon privacy.*—The accused in the middle of the night effected an entry into a room occupied by four women. On an alarm being given and an attempt made to capture him he escaped. He was charged with an offence under s. 456 of the Penal Code. The defence set up was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the room, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal. *Held*, that the facts proved were good evidence of an intent and of an intrusion on privacy within the meaning of s. 509 of the Penal Code, and that therefore the intent to commit an offence within the meaning of s. 441 was made out. PREMANUNDO SHAHA *v.* BRINDABUN CHUNG, 22 C. 994 ... 660

Crops. PAGE

(1) Deposit of—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 480.

(2) Suit for damages for misappropriation of—See LIMITATION, 22 C. 877.

Cruelty.

See DIVORCE, 22 C. 544.

Custom.

(1) See LANDLORD AND TENANT, 22 C. 742.

(2) See PLEADINGS, 22 C. 324.

Damages.

(1) For misappropriation of crops—See LIMITATION, 22 C. 877.

(2) Suit for—See LANDLORD AND TENANT, 22 C. 742.

Daughter.

Unchastity of—See HINDU LAW (INHERITANCE), 22 C. 347.

Debt.

(1) Acknowledgment of, in writing—See STAMP ACT (I OF 1879), 22 C. 757.

(2) Enforcement of, by creditor—See THEFT, 22 C. 669, 1017.

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Removal by creditor of property of—See THEFT, 22 C. 669, 1017.

Declaration.

As to execution of Power of Attorney—See PRACTICE, 22 C. 491.

Declaratory Decree.

Suit for—See HINDU LAW (REVERSIONER), 22 C. 354.

Decree.

(1) Application for transfer of—See LIMITATION ACT (XV OF 1877), 22 C. 375.

(2) By consent—See EXECUTION OF DECREE, 22 C. 859.

(3) Creating charge for maintenance — See EXECUTION OF DECREE, 22 C. 903.

(4) *Ex parte*, order setting aside—See APPEAL (GENERAL), 22 C. 981.

(5) Form of—See PRACTICE, 22 C. 100.

(6) Form of—See REPRESENTATIVE, 22 C. 259.

(7) For payment of money by instalments—See EXECUTION OF DECREE, 22 C. 859.

(8) For rent and cancelment of lease—See ACT I OF 1879 (CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE), 22 C. 467.

(9) For sale—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 364.

(10) For use and occupation in suit for rent—See IMMOVEABLE PROPERTY, 22 C. 752.

(11) Granted on different cause of action from that sued on—See HINDU LAW (WIDOW), 22 C. 589.

(12) In suit for partition—See PARTITION, 22 C. 425.

(13) *Nisi*—See MORTGAGE (SIMPLE), 22 C. 931.

(14) Obtained before Bengal Tenancy Act came into force—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 364.

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(15) Obtained not in accordance with Transfer of Property Act in suit instituted after passing of Act—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 813.

(16) Of Courts of Foreign States, suits on—See FOREIGN COURT, 22 C. 222.

(17) Pending appeal, surety for amount of—See SURETY, 22 C. 25.

(18) Where puisne mortgagee is a defendant, and asks for account on footing of his mortgage—See PRACTICE, 22 C. 100.

Decree-holder.

Purchase by—See SALE, 22 C. 909.

Decree of 1805.

See ENHANCEMENT OF RENT, 22 C. 214.

Deed.

(1) Invalid as Wakfnama—See MAHOMEDAN LAW (WAKF), 22 C. 619.

(2) Of appointment in favour of children—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Defamation.

Good faith—Privilege—Letter written by Guru outcasting member of his caste—Penal Code, ss. 499, 500.—*B*, the *guru* or spiritual guide of the caste to which *K* belonged, issued a letter or *ajna patra* to *K*'s fellow-villagers to the effect that as *K*'s wife had been caught with a man of a lower caste, no one of her co-religionists should have any social intercourse with her, and in effect that she should be outcasted. *K* proceeded against *B* for defamation, and *B* pleaded that the statements contained in the letter were privileged, having been made in good faith and for the public good, and that the case came within one of the exceptions to s. 499. It was admitted by *K* that *B* had no enmity towards him or his wife, and that it was the custom of the *guru* to settle such matters as those that had arisen in connection with his wife, and it was proved that the letter was issued after *B* had made an enquiry into the truth of the allegation. The lower Court convicted. *Held*, that the conviction was wrong, it being clear that the statements contained in the letter had been made in good faith for the protection of the social and spiritual interests of the community of which *B* was the *guru*, and that so far as they implied a censure on the conduct of *K*'s wife, they were justified by the authority with which *B* was vested as spiritual head of the community, and that therefore the case came within the seventh exception to s. 499. BASUMITI ADHIKARINI v. BUDHRAM KOLITA, 22 C. 46 ... 32

Default.

Of appearance, suit struck off for—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 8.

Delivery.

Of property—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 179.

Depositaries.

Suit against—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 480.

Descendants PAGE

In third degree from common ancestor—See HINDU LAW (INHERITANCE, 22 C. 339.

Discovery.

And inspection of documents—See PRACTICE, 22 B. 891.

Discretion.

Of Court as to punishment after conviction of murder—See CONVICTION, 22 C. 805.

Disqualified Owner.

See RIGHT OF SUIT, 22 C. 729.

Distress Warrant.

See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 935.

District Magistrate.

(1) Power of Sessions Judge to interfere with orders of—See SANCTION FOR PROSECUTION, 22 C. 573.

(2) Power of tc transfer or withdraw cases—See CRIM. PRO CODE (ACT X OF 1882), 22 C. 878.

Divorce.

Practice — Judicial separation, Previous decree for — Dissolution of marriage, Evidence in suit for—Res judicata—Cruelty—Adultery—Identity of parties—Divorce Act (*IV of* 1869), *s.* 10.—In a suit for dissolution of marriage by reason of the cruelty and adultery of the respondent, the first charge and the marriage of the parties were held to be established by the production of a previous decree for judicial separation on account of cruelty, and by proof of the identity of the parties. LEDLIE v. LEDLIE, 22 C. 544. ... 362

Divorce Act (IV of 1869).

S. 10—See DIVORCE, 22 C. 544.

Document.

(1) Discovery and Inspection of—See PRACTICE, 22 C. 891.

(2) Fabrication of, to conceal embezzlement—See CRIMINAL BREACH OF TRUST, 22 C. 313.

(3) Referred to in pleadings—See INSPECTION, 22 C. 105.

Ejectment.

Suit for—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 77.

Election Law.

See MUNICIPAL ELECTION, 22 C. 717.

Endorsement.

(1) Of Hundi by payee—See JURISDICTION, 22 C. 451.

English Rule of Law.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 8.

Enhancement.

Of Rent—Independent taluk formerly part of a zemindari—Decree of 1805—*Regulation* VIII *of* 1793, *ss.* 51 *and* 76—*Bengal Tenancy Act*, 1885, *s.* 67.—A decree of the Sudder Diwani Adalut in 1805 declared that

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a *taluk* was fit to be separated from the zemindari of which it had originally been part according to the provisions of s. 5, Regulation VIII of 1793. The decree directed that, until separation, rent should be paid by the *talukdar* to the zemindar, "according to the *jumma* already assessed upon the *taluk*," this revenue to be, on the separation being effected, deducted from that assessed upon the zemindari. Proceedings with a view to separation then continued, but litigation and delays ensued, with the result that no separation had been effected when these suits were instituted in 1882 and 1885. In these suits the holders of shares into which the zemindari had been partitioned claimed to enhance the rent on the *taluk*. *Held*, that the decree of 1805, acted upon for many years, was conclusive that the *taluk* was not dependent on the zemindary, but an independent one, within s. 5, Regulation VIII of 1793; and that, therefore, the zemindars had no right of enhancement. S. 67 of the Bengal Tenancy Act, 1885, applies only to rent payable quarterly. HEMANTA KUMARI DEBI v. JAGADINDRA NATH ROY BAHADUR, 22 C. 214 (P.C.) = 21 I.A. 131 = 6 Sar. P.C.J. 173 ... 144

Escape.

From arrest—See PENAL CODE (ACT XLV OF 1860), 22 C. 759.

Estoppel.

(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 364.

(2) See SALE, 22 C. 909.

Evidence.

(1) Admissibility in, of confession not recorded in language in which it is given—See CONFESSION, 22 C. 817.

(2) *Admissibility of evidence — Presumption arising from facts of permanency of tenancy—Long possession at an unvaried rent.*—A zemindar claimed the proprietary right and possession of *mouzas* within the limits of his zemindari, against tenants, who, by themselves and their predecessors in title, had held the land from before the Decennial Settlement in Bengal, an unvaried rent having been paid to the zemindar. The first defendant alleged a grant to his ancestor of a *mokurari* tenure by a ghatwal then holding land within the zemindari: the other defendants alleged title as *dar-mokuraridars* under the first. Part of the evidence for the defence consisted of judgments, among which was one of the year 1817, and another of 1843, to which the zamindar's predecessors had not been parties. These had been given in suits brought by the successor of the ghatwal which had been resisted by the first defendants' ancestors, on the ground of their having had fixity of tenure. *Held*, that they could be received as evidence of long anterior possession at a rent, and of the title on which the defendants now relied having been openly asserted long ago. Taken with other evidence, they established possession by the defendants at a uniform rent paid to the zemindar, thus leading to the inference that the tenure had been, and still was, of a permanent character. RAM RANJAN CHAKERBATI v. RAM NARAIN SINGH, 22 C. 533 (P.C.) = 22 I.A. 60 = 5 M.L.J. 7 = 6 Sar. P.C.J. 530 ... 355

Evidence—(*Concluded*). PAGE

(3) As to the continuance of joint holding of property—See BURDEN OF PROOF, 22 C. 85.

(4) Causing disappearance of—See PENAL CODE (ACT XLV OF 1860), 22 C. 638.

(5) *Probabilities—Execution of will.*—The fact of the execution of a will was disputed by a testator's relations. They impugned the will mainly on the theory of the improbability of its having been executed by him under the circumstances existing at the time, and in the presence of the witnesses alleged to have attested it. They admitted his intention to execute such a will, but contended that, having long deferred the execution, he had died without having effected it. To outweigh the strong and satisfactory evidence upon which the affirmative of due execution rested, it would have been necessary that the improbability should have been cogent and clearly made out. But in their Lordships' opinion it was neither the one nor the other, and was based on an exaggerated view. The suggested inferences against the will were not borne out; and, on the other hand, the testimony in support of it was good. The judgment of the High Court, maintaining the will, was affirmed. CHOTEY NARAIN SINGH *v.* RATAN KOER, 22 C. 519 (P.C.) = 22 I. A. 12 = 6 Sar. P.C.J. 564 ... 347

(6) See ACT II OF 1869 (CHOTA NAGPORE TENURES), 22 C. 112.

Evidence Act (I of 1872).

(1) Ss. 24, 30—See PARDON, 22 C. 50.

(2) Ss. 30, 106—See PENAL CODE (ACT XLV OF 1860), 22 C. 164.

Execution.

Under old Rent Law—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 364.

Execution of Decree.

(1) Application for, by minor after death of next friend—See PRACTICE, 22 C. 270.

(2) *Charge for maintenance created by a decree—Charge how enforced—Transfer of Property Act* (*IV of* 1882), *ss.* 67 *and* 99—*Civ. Pro. Code* (*Act XIV of* 1882), *s.* 244 (*c*)—*Separate suit.*—Where a decree, after declaring the amount payable to the plaintiff in respect of future maintenance, and that it should be a charge on certain immoveable property which formed a specific item in the general estate of a testator, went on to direct that for the purpose of securing the payment of the future maintenance, a deed should be executed in favour of the plaintiff, charging such immoveable property, on her executing a release of all her rights and interest in the general estate. *Held*, that such a charge was properly enforced by a suit brought on the deed, and that it could not be given effect to by proceedings in execution. In a suit by a creditor against the estate of a deceased debtor, who has died leaving a will, his heirs on intestacy do not represent his estate, and the suit is bad unless the estate is represented. MATANGINI DASSEE *v.* CHOONYMONEY DASSEE, 22 C. 903 ... 598

(3) Commenced before Act V of 1894—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 767.

Execution of Decree—(*Continued*). PAGE

(4) *Decree for payment of money by instalments on specified dates—Charge—Transfer of Property Act* (IV *of* 1882), *ss.* 67, 99, 100—*Consent decree—Separate suit.*—Where by a consent decree it is ordered that payment of the decretal amount be made by instalments, and that the properties set forth in a schedule annexed to the decree stand charged with payment of the said instalments, the said properties cannot be sold in execution of the decree, but a separate suit must be brought under s. 67 of the Transfer of Property Act. AUBHOYESSURY DABEE v. GOURI SUNKAR PANDAY, 22 C. 859 ... 568

(5) Obtained not in accordance with Transfer of Property Act—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 813.

(6) Partially executed by Court to which it has been transferred—Application for return of—See LIMITATION ACT (XV OF 1877), 22 C. 827.

(7) Question relating to—See RIGHT OF SUIT, 22 C. 501.

(8) Sale in execution of—See JURISDICTION, 22 C. 871.

(9) Suit for property wrongly taken in—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 483.

(10) *Transfer of decree for execution—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 223, 226—*Execution of decree passed in another district—Jurisdiction.*—On the application of the decree-holder, a decree for money passed by a Munsif in one district was sent for execution to the Court of a Munsif in another district, and not to the District Court, as provided for in s. 223 of the Civ. Pro. Code. *Held*, that the Munsif's Court, to which the decree was sent for execution, had no jurisdiction to execute it without an express order of the District Judge under s. 226. DEBI DIAL SAHU v. MOHARAJ SINGH, 22 C. 764. 507

(11) *Transfer of decree for execution—Execution against representative of debtor—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 234, 248, 249 *and* 578—*Application by decree-holder for execution of decree by substitution on death of the judgment-debtor to the Court to which the decree has been transferred.*—A decree was transferred to another Court for execution. Pending the proceedings, one of the judgment-debtors died. On an application to that Court by the judgment creditor to execute the decree against the legal representative of the deceased judgment-debtor, a notice was issued under s. 248 of the Code of Civil Procedure. The legal representative objected that the Court had no jurisdiction to entertain the application, and that the application should have been made under s. 234 of the Code to the Court that passed the decree. *Held*, that the power of the Court executing a decree to order execution under s. 249 against the legal representative of a deceased judgment-debtor, after the issue of notice under s. 248, is not cut down by the provisions of s. 234, which simply empowers the decree-holder to apply to the Court which passed the decree to execute it against the legal representative of a judgment-debtor who is dead, and that the Court to which the decree has been transferred has full jurisdiction to allow execution to proceed against the legal representative. *Held*, also, that even assuming that an application under s. 234 to the Court which passed the decree was a necessary preliminary to proceedings under s. 248 by the Court executing the decree, the omission to make it was only an irregularity which did not affect the merits of the case, and under s. 578 the order of the

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Court of first instance should not have been reversed on account of such irregularity. SHAM LAL PAL v. MODHU SUDAN SIRKAR, 22 C. 558 ... 372

(12) See ACT I OF 1879 (CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE), 22 C. 467.

(13) See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 644.

(14) See LIMITATION ACT (XV OF 1877), 22 C. 921.

(15) See MORTGAGE (SIMPLE), 22 C. 931.

(16) See PRIVY COUNCIL, 22 C. 1.

(17) See SURETY, 22 C. 25.

Executor.

(1) *Contract—Consideration—Gratuitous contract—Contract to pay remuneration to executor for performance of his duties—Remuneration not coming out of assets of estate—Administrator-General's Act* (II *of* 1874), *s.* 56—*Illegal contract as being opposed to public policy—Contract Act* (IX *of* 1872), *s.* 23—*Executors, position and rights of.*—The defendant's brother appointed as executrix and executors of his will his wife *K*, together with the plaintiff and another, and the plaintiff being unwilling to undertake the duties of executor without remuneration, *K* offered him, and he accepted a sum of Rs. 125 a month for acting as executor; but before any formal agreement was entered into, the defendant's *dewan* on her behalf proposed to the plaintiff that he should accept a *perwana* for Rs. 125 a month from the defendant instead of from *K*, to which the plaintiff agreed, and he accordingly received from the defendant a *perwana* in which she agreed to pay him from her own pocket the above sum monthly as long as he continued to perform the duties of executor of the estate of her brother, in which she was interested. In pursuance of this agreement, the plaintiff, in conjunction with the other executor, took out probate of the will, and the stipulated remuneration was paid for some time and then ceased. In a suit for his salary for the portion of the time during which he had acted as executor and had not been paid. *Held*, there was good consideration for the agreement. Such an agreement, moreover, was not unlawful by reason of s. 56 of the Administrator-General's Act (II of 1874), the words "receive and retain" in that section referring to the receipt or retention by an executor or administrator of commission or agency charges from the assets of the estate and not to remuneration paid to him by a third person. *Held*, also, that the agreement was not void under s. 23 of the Contract Act as being illegal or contrary to public policy, and a suit upon it was under the circumstances maintainable. NARAYAN COOMARI DEBI v. SHAJANI KANTA CHATTERJEE, 22 C. 14 ... 11

(2) Of Hindu testator, Power of—See ACT II OF 1874 (ADMINISTRATOR GENERAL'S), 22 C. 788.

Ex parte Decree.

See APPEAL (GENERAL), 22 C. 981.

False Statement.

In application for license—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

Findings of Fact. PAGE

See LIMITATION ACT (XV OF 1877), 22 C. 609.

Fire.

See ACT I OF 1871 (CATTLE TRESPASS), 22 C. 139.

Fishery.

Right of—Right of fishery in tidal navigable river—Right of Government in nagivable rivers and fishery therein—Grant by Government of right to private individuals.—As regards this side of India the bed of a tidal navigable river is vested in the Crown; and the right of fishery in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown or as representing the public) to private individuals to be held by them as private property subject to the right of navigation and such other rights as the public has in such rivers. Value as evidence of the *thukbast* map in such a case discussed. SATCOWRI GHOSH MONDAL v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 22 C. 252 ... 170

Foreign Court

Judgment of—Suits in British Courts on judgments and decrees of Courts established in recognised Foreign States—Territorial jurisdiction of each separate State in personal actions—Civ. Pro. Code (Act XIV *of* 1882), *ss.* 431, 434.—Jurisdiction being properly territorial, and attaching, with certain restrictions upon every person permanently or temporarily resident within the territory, does not follow a foreigner, after his withdrawal thence, living in another State. As to land within the territory jurisdiction always exists, and may exist over moveables within it; and exists in questions of *status*, or succession, governed by domicile. But no territorial legislation can give jurisdiction, which a Court of a Foreign State ought to recognize, over an absent foreigner owing no allegiance to the State so legislating. In a personal action, to which none of the above causes of jurisdiction apply, a decree pronounced by a Court of a Foreign State *in absentem*, the latter not having submitted himself to its authority, is by international law a nullity. Not to the Courts of the State in which the cause of action has arisen, nor in cases of contract to those of the *local solution is*, should resort be had by the plaintiffs, but to the Courts of the State in which the defendant resides, the Courts of the latter State having jurisdiction in all personal actions. *Ex parte* decrees for money were made in the territories of the ruling Chief of Faridkot, a State in subordinate alliance with the Government of India, against a person who had been employed by that State within its territories, but had before suits brought relinquished his employment, had left the State, and was then, at the time when he was sued, resident in another State of which he was the domiciled subject; *Held*, that these decrees were a nullity by international law, and could not receive effect in a British Indian Court. The judgment of Blackburn, J., in 6 Q.B. 155, referred to and explained. There is no ground for supposing, as did one of the Courts below, that no suit will lie upon the judgment of a recognized Foreign Indian State. GURDAYAL SINGH v. RAJA OF FARIDKOT, 22 C. 222 (P.C.)=21 I.A. 171=4 M.L.J. 267=6 Sar. P.C.J. 503=112 P.R. 1894=L.R. (1894) A.C. 670=11 R.R. 340 ... 149

Foreign States. PAGE

Territorial jurisdiction of—See FOREIGN COURT, 22 C. 222.

Forfeiture.

(1) Of inheritance—See HINDU LAW (INHERITANCE), 22 C. 347.
(2) See HINDU LAW (WIDOW), 22 C. 589.

Forged Document.

Filed in Court—See COMMITMENT, 22 C. 1004.

Forgery.

See CRIMINAL BREACH OF TRUST, 22 C. 313.

Fraud.

Secrecy as evidence of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Gayawals.

Practice of, in adopting sons—See LIMITATION ACT (XV OF 1877), 22 C. 609.

Ghatwali Tenure.

Right of succession to ghatwali *tenure in Beerbhoom — Reg.* XXIX *of* 1814, *s.* 2—"*Descendants,*" *Meaning of—Impartible property—Separate property—Hindu law, Mitakshara.—Ghatwali* tenures in Beerbhoom are tenures to be held in perpetuity and are descendible from generation to generation subject to certain conditions and obligations, and it would be inconsistent with the true character of these tenures to hold that the Legislature intended that they should devolve on issue of the body only, and not on heirs generally according to the law which may govern such succession. The word "descendants" therefore in s. 2 of Bengal Reg. XXIX of 1814 is not to be construed in its restricted meaning, but includes the widow of a deceased *ghatwal* who may therefore be one of his heirs. Where a *ghatwali* tenure was admittedly impartible and governed by Mitakshara law, and the only heirs were the widow and the brother of the late *ghatwal*. *Held* (it being found on the evidence that the brothers had separated and that the *ghatwali* tenure was the exclusive property of the late *ghatwal*), that his widow was his heiress according to Mitakshara law. Although, according to the decision of the Privy Council in 1 C. 153; 13 W.R. P.C. 21, impartible property is not necessarily separate property; yet, *semble* that with reference to the peculiar character of *ghatwali* tenures as described in Reg. XXIX of 1814 they were intended to be the exclusive property of the *ghatwal* for the time being and not joint family property in the proper sense of the term. CHHATRADHARI SINGH v. SARASWATI KUMARI, 22 C. 156 ... 105

Good Faith.

See DEFAMATION, 22 C. 46.

Government.

Right of, in navigable rivers—See FISHERY, 22 C. 252.

Grant.

By Government to private individuals—See FISHERY, 22 C. 252.

Gratuitous Contract. PAGE

See EXECUTOR, 22 C. 14.

Guardian.

Contract made by, with sanction of Court—See SPECIFIC PERFORMANCE, 22 C. 545.

Hat.

Lease of—See IMMOVEABLE PROPERTY, 22 C. 752.

High Court.

(1) Jurisdiction of—See MUNICIPAL ELECTION, 22 C. 717.

(2) See SANCTION FOR PROSECUTION, 22 C. 487.

(3) See REVISION, 22 C. 998.

(4) In revision—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

(5) See CRIMINAL TRESPASS, 22 C. 391.

(6) In second appeal—See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 22 C. 419.

(7) To interfere in pending proceedings—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

(8) To make orders in suit after order of Privy Council dismissing it—See APPEAL TO PRIVY COUNCIL, 22 C. 1011.

Hindu Executor.

Transfer by, to Administrator General—See ACT II OF 1874 (ADMINISTRATOR GENERAL'S), 22 C. 788.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—CASTE.
4.—CUSTOM.
5.—GIFT.
6.—IMPARTIBLE ESTATES.
7.—INHERITANCE.
8.—JOINT FAMILY.
9.—MAINTENANCE.
10.—RELIGIOUS ENDOWMENTS.
11.—REVERSIONER.
12.—SUCCESSION.
13.—WIDOW.

———1.—Adoption.

(1) By widow after estate has vested in co-widow, effect of—See SALE, 22 C. 565.

(2) See LIMITATION ACT (XV OF 1877), 22 C. 609.

———2.—Alienation.

(1) Of endowed property—See HINDU LAW (RELIGIOUS ENDOWMENTS), 22 C. 989.

(2) Power of widow to alienate property for religious and charitable purposes—See HINDU LAW (WIDOW), 22 C. 506.

(3) Suit by reversioners to set aside—See HINDU LAW (WIDOW), 22 C. 506.

———3.—Caste.

Letter written by Guru outcasting member of—See DEFAMATION, 22 C. 46.

Hindu Law—4.—Custom. PAGE

(1) Of remarriage of—See HINDU LAW (WIDOW), 22 C. 589.

(2) See HINDU LAW (RELIGIOUS ENDOWMENT), 22 C. 843.

————5.—Gift.

By reversioner to widow of moiety of estate—See HINDU LAW (REVERSIONER), 22 C. 354.

————6.—Impartible Estates.

See GHATWALI TENURE, 22 C. 156.

————7.—Inheritance.

(1) And survivorship under Mitakshara Law—See BURDEN OF PROOF, 22 C. 85.

(2) *Forfeiture of inheritance—Unchastity—Daughter—Bengal School of Hindu law.*—According to the Bengal School of Hindu law, a daughter who is unchaste is precluded from inheriting the property of her father. RAMANANDA *alias* HARIS CHANDRA CHOWDHRY v. RAIKISHORI BARMANI, 22 C. 347 ... 233

(3) *Mitakshara—Insanity subsequent to inheriting of property—Committee in lunacy under Act* XXXV *of* 1858, *Mortgage of joint family property by.*—Under the Mitakshara law, a person who has succeeded to the inheritance of property does not lose his right on his becoming insane at a subsequent time. The father and head of a joint family under the Mitakshara law having become insane two of his grandsons, acting as committees appointed under Act XXXV of 1858, mortgage the joint family property on behalf of the lunatic, with the sanction of the Judge. The mortgagee sued upon the mortgage, and obtained a decree against them both in their own capacity and as guardians of their grandfather. *Held*, that the act of the committee might well be regarded as the act of the father, and head of the family, and the debt having been contracted for the benefit of the family, the whole family was bound by the mortgage and decree, and that the sale in execution thereof passed the entire property. ABILAKH BHAGAT v. BHEKHI MAHTO, 22 C. 864 ... 572

(4) *Sapindas—Bandhus—Mitakskara law—Descendants in third degree from common ancestor—Second cousins.*—The plaintiffs were descended in the third degree from *M* who was *R*'s maternal great-grandfather, and *R* was descended in the third degree from *M* who was the plaintiffs' maternal great-grandfather. *Held*, with reference to the definition of *bandhu* and *sapinda* in the Mitakshara (by which, School of Hindu law the parties were governed) that the plaintiffs were *R's sapindas* through his mother, and *R* was the plaintiffs' *sapinda* directly ; and being thus mutually related as *sapindas*, the plaintiffs were heritable *sapindas* and *bandhus* of *R*, *exparte maternal* and on his death without issue were entitled to his property as his heirs. BABU LAL v. NANKU RAM, 22 C. 339 ... 228

————8.—Joint Family.

(1) *Mitakshara—Right of a widow to receive maintenance from her husband's brothers and nephew—Death of the plaintiff's husband prior to his father's death.*—In a joint Hindu family governed by the Mitakshara law, the property of *S*, the father, consisted, at any

Hindu Law—8.—Joint Family—(*Concluded*). PAGE

rate partly, of ancestral property. He died leaving three sons and one grandson (son of a predeceased son). *A*, another son of *S*, died childless before his father, leaving his widow, the plaintiff. In a suit by her against the brothers and the nephew of her husband for maintenance, in which she claimed Rs. 100 a month : *Held*, that as the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's lifetime, enforced partition of that property, and as the Hindu law provides that the surviving co-parceners should maintain the widow of a deceased co-parcener, the plaintiff was entitled to maintenance. *Held*, also, that, in determining the amount of maintenance, the Court should take into consideration not only the reasonable wants of a person in her position of life, but also the means of the family of her husband. DEVI PERSAD v. GUNWANTI KOER, 22 C. 410 ... 274

(2) Mortgage of, by Committee in Lunacy under Act XXXV of, 1858—See HINDU LAW (INHERITANCE), 22 C. 864.

(3) Property—See LIMITATION ACT (XV OF 1877), 22 C. 954.

(4) See BURDEN OF PROOF, 22 C. 85.

——9.—Maintenance.

(1) Charge, for created by decree—See EXECUTION OF DECREE, 22 C. 903.

(2) Determination of amount of—See HINDU LAW (JOINT FAMILY), 22 C. 410.

(3) *Order of Criminnl Court as to—Crim. Pro. Code*, 1882, s. 488—*Breach of order for monthly allowance—Imprisonment on default of payment of maintenance—Sentence absolute.*—A wife, who had obtained an order for maintenance against her husband on the 1st August, applied to have it enforced with respect to three months then in arrears. A distress warrant having issued without anything being realised, the husband was brought up under a warrant for his arrest. The husband, previous to his arrest, petitioned the Court to be allowed to prove his altered circumstances and his inability to pay. On that petition an order was passed that he could produce the evidence after the amount due was paid. On being brought up and not paying the amount due, an order was made committing him for one month under s. 488 of the Code of Criminal Procedure. The day following his commitment, his brother tendered the money and asked for his release. The Magistrate took the money but refused to order the release, holding that under the section the punishment of imprisonment was absolute and not dependent on payment of the maintenance allowance. The husband moved the High Court, contending (1) that the order of imprisonment shouldnot have been passed without an opportunity being given him of proving the change in his circumstances which would show that the order to pay required modification ; (2) that the section did not authorise imprisonment unless wilful neglect to comply with the order be proved ; and (3) that the imprisonment authorized by the seotion being only a mode of enforcing payment, he should have been released on the amount being paid. *Held*, that the first ground was untenable, inasmuch as the order for maintenance carries with it all its proper consequences as long as

Hindu Law—9.—Maintenance—(*Concluded*). PAGE

it remains in force. *Held*, also that before an order for imprisonment under the section can be passed it must be proved that the non-payment of the maintenance is the result of wilful negligence, and that there being no evidence of that in the case the order was bad. *Held*, further, that the imprisonment which can be awarded under the section is not a punishment for contempt of the Court's order, but merely a means of enforcing payment of the amount due, and that upon the payment of that amount being made the husband was entitled to be released. SIDHESWAR TEOR v. GYANADA DASI, 22 C. 291 ... 195

(4) Right of widow to receive, from her husband's brothers and nephew —See HINDU LAW (JOINT FAMILY), 22 C. 410.

———10.—Religious Endowments.

(1) *Powers of Shebait—Alienation of endowed property.*—Where the father of the plaintiffs, who was a *shebait* of certain *debutter* property, granted a *mourasi mokurari* lease of a portion of that property to his co-*shebait*, the grand-father of the defendants, such lease being granted without any legal necessity: *Held*, that such lease was wholly void. PROSUNNO KUMAR ADHIKARI v. SARODA PROSUNNO ADHIKARI, 22 C. 989 ... 657

(2) *Succession as* mohant *of a* muth *at Puri—Customary rule—Right of a* chela*—Alleged disqualification of* mohant *to take a* chela *by reason of being a leper.*—Two rival claimants contested the right to succeed to the office of *mohant* of a *mourasi muth* under a customary rule of succession. Both the Courts below found that the *mohant* for the time being had power to appoint his successor from among his *chelas*; that, in the absence of appointment, a *chela*, or, if there should be more than one, the eldest *chela*, would succeed; and that, should there be no *chela*, then a *gurubhai* or *chela* of the same *guru* with the deceased *mohant*, would succeed. The plaintiff's case was that he had been duly taken as a *chela* and appointed by the last *mohant* whose title was not disputed. The defendant, who was in possession, denied that the plaintiff had ever been such a *chela*, alleging that, even if the last *mohant* had attempted to take him as a *chela*, this act would have been invalid by reason of that *mohant* having been a leper. The defendant's title was that he had been taken as a *chela* by the *mohant* who had preceded the last, and had been in a position to dispute the right of succession, but had yielded it when the last *mohant* had taken office. He put forward an alleged will of the latter, which stated that he was to succeed, and relied on his possession approved by other *mohants*. *Held*, that only a leprosy of virulent form could have disqualified the last *mohant*. As to it there was no medical evidence; but on the facts the conclusion was that there had been no such disqualification. The statements in the alleged will were not true, and it was ineffectual to alter the title, whether the last *mohant* had executed it or not, having no testamentary effect. Also, what had been done after the death of the last *mohant* could not deprive the plaintiff, or entitle the defendant, there being no custom to authorize the choice of a *mohant* in that way. BHAGABAN RAMANUJ DAS v. RAM PRAPARNA RAMANUJ DAS, 22 C. 843 **P.C.** = 22 I.A. 94 = 6 Sar. P.C.J. 536. 558

Hindu Law—11.—Reversioner. PAGE

(1) *Arrangement between widow and reversioner—Relinquishment by Hindu widow of her life interest to reversioner—Gift by reversioner to widow of moiety of estate—Declaratory decree, Suit for—Suit by reversioner in lifetime of widow—Specific Relief Act (I of* 1877), s. 42. —*M* died, possessed of certain immoveable properties, and leaving two widows, one of whom died shortly after him, leaving a daughter's son *R*. The other widow *S* came to an arrangement with *R*, under which, on 9th December 1889, two deeds were executed, by the first of which *S* relinquished to *R* her life interest in the properties she inherited as widow of *M*, and by the other *R* conveyed to *S* an absolute right in half the properties so relinquished, of retaining the other half himself. *R* died on 27th November 1890, and his widow *P* came into possession of the half share of the properties belonging to him. In a suit by the plaintiff, as the next reversionary heir of *M* for a declaration that the deeds were invalid and did not affect his reversionary right. *Held*, that the suit was maintainable in the lifetime of the widow. *Held*, also following, the case of 10 C. 1102, that the moiety of the properties, which was given by *S* to *R*, was absolutely alienated in his favour, and the plaintiff was not entitled to question the validity of the alienation so far as that portion of the properties was concerned. *Held*, further, that, though the effect of the decision in 10 C. 1102 is to make the widow and the presumptive reversioners competent to deal with the estate absolutely for certain purposes, the widow cannot, with the consent of the presumptive reversioner, convert her life interest in any portion of her husband's estate which she retains for herself into an absolute interest freed from all restraint on alienation. The plaintiff was, therefore, entitled to a declaration that the deeds were inoperative in affecting his reversionary interest, so far as regarded the moiety in possession of S. HEM CHUNDER SANYAL *v.* SARNAMOYI DEBI, 22 C. 354 ... 238

(2) Suit by, to set aside alienation—See HINDU LAW (WIDOW), 22 C. 506.

(3) See LIMITATION ACT (XV OF 1877), 22 C. 445.

(4) See SALE, 22 C. 641.

————12.—Succession.

(1) As Mohant—See HINDU LAW (RELIGIOUS ENDOWMENT), 22 C. 843.

(2) Right of, to ghatwali tenure in Beerbhoom—See GHATWALI TENURE, 22 C. 156.

————13.—Widow.

(1) And reversioner, Arrangement between—See HINDU LAW (REVERSIONER), 22 C. 354.

(2) *Custom of remarriage of—Forfeiture—Decree granted on a different cause of action.*—A Hindu widow, on remarriage forfeits the estate inherited from her former husband, although, according to custom prevailing in her caste, a remarriage is permissible. Plaintiffs' suit was that they were co-owners with *B* of a certain property as members of a joint-family under the Mitakshara law ; that after *B*'s death, a 3½ annas share of the property was registered under the Land Registration Act in the name of *A*, the mother of *B*, although the plaintiffs were the owners in possession, and *A* was entitled only

Hindu Law—13.—Widow—(*Continued*). PAGE

to maintenance; that a gift was made of $1\frac{1}{2}$ annas' share by *A* to her daughter and daughter's son, without right, and the donees having granted a *zuripeshgi* lease in respect of that share the *zuripeshgidars* took possession thereof. The plaintiffs, accordingly, prayed for recovery of possession by establishment of their alleged right of ownership, or, in the alternative, for a declaration that they were reversionary heirs to the estate of *B*, and as such not bound by the gift and the *zuripeshgi* lease aforesaid. *A* died during the pendency of the suit. It was found that plaintiffs were not co-owners with *B* as alleged; but that, as reversionary heirs, they became entitled to possession upon *A*'s death after the institution of the suit. *Held*, that as the plaintiffs had claimed to recover possession in the suit, and as *A* died before the case was taken up for trial, the plaintiffs were entitled to the relief, although they asked it on a ground different from that on which they recovered judgment. RASUL JEHAN BEGUM v. RAM SURUN SINGH, 22 C. 589 ... 392

(3) Effect of adoption by one, after estate has vested in co-widow—See SALE, 22 C. 565.

(4) Gift by, to widow, of moiety of estate—See HINDU LAW (REVERSIONER), 22 C. 354.

(5) *Mesne profits payable under a decree against a Hindu widow and other defendants—Subsequent suit for contribution against the widow by one of the defendants from whom the whole amount of mesne profits had been realised—Sale in execution of decree—Rights of the auction purchaser.*—*M*, widow of *N*. a Hindu and *K* (brother of *N*), jointly brought a suit against *C*, her sons and others, for recovery of possession of certain property which had devolved upon *N* and *K*, by inheritance, obtained a decree and were put into possession. *G*, one of the sons of *C*, subsequently brought a suit against *M* and the legal representatives of *K* then deceased, and also against *J* (to whom *K* had sold a portion of the property after a decree), and obtained a decree with mesne profits, for his share of the same property. *G* then sold the decree to *R*, who executed it for mesne profits against *J* alone and realized the entire decretal amount from him. *J* thereupon brought two suits for contribution against *M* and the legal representatives of *K*, on account of the mesne profits payable by them, according to their respective shares, and obtained decrees. In execution of one of these decrees passed against *M*, he sold the property in suit belonging to the estate of *N*, and purchased a moiety of it himself. In a suit on the death of *M* by the reversionary heirs of *M* to recover possession of his share of the property, in which his widow *M* had only a life-interest, on the allegation that only for her life-interest and not the entire estate passed. *Held*, that the suit for contribution brought by *J* was a suit to recover a debt due by the estate. The amount of the debt in the shape of mesne profits had been decreed against M and others, as representing the estate of *N* and *K* and it was not therefore a personal debt of *M*. That being so, the purchaser at the auction sale took the entire estate and not merely the qualified interest of the widow. BARODA KANTA CHATTOPADHYA v. JATINDRA NARAIN ROY, 22 C. 974 ... 646

(6) Mitakshara—*Power of a Hindu widow to dispose of property for religious and charitable purposes—Suit to set aside alienation by reversioners.*

Hindu Law—13.—Widow—(*Concluded*). PAGE

—A Hindu widow inheriting the estate of her deceased husband *K*, executed a deed of endowment in favour of the *pujari* of a *thakurbarie*, (temple) established by her deceased husband's mother. In a suit brought by the reversionary heirs of her deceased husband after the death of the widow to set aside the alienation. *Held*, that inasmuch as the ideal was established by the mother of the deceased *K*, and he had made no provision for its maintenance, and the dedication was *prima facie* one for the widow's own spiritual welfare, not for that of her deceased husband *K*, and because the property alienated was a considerable value, the alienation was not valid against the reversioners either on the ground of religious necessity, or that being for a pious purpose the property alienated represented only a small portion of the estate inherited by the widow. RAM KAWAL SINGH v. RAM KISHORE DAS. RAM KISHORE DAS v. RAM KAWAL SINGH, 22 C. 506 ... 328

(7) Of insolvent debtor—See REPRESENTATIVE, 22 C. 259.

(8) Relinquishment of life estate by widow to reversioner—See HINDU LAW (REVERSIONER), 22 C. 354.

(9) Right of, to maintenance—See HINDU LAW (JOINT FAMILY), 22 C. 410.

(10) Sale of share of—See SALE, 22 C. 641.

(11) Suit by reversioner in lifetime of widow—See HINDU LAW (REVERSIONER), 22 C. 354.

(12) See LIMITATION ACT (XV OF 1877), 22 C. 445.

Holidays.

See SANCTION FOR PROSECUTION, 22 C. 176.

House-breaking by night.

See CRIMINAL TRESPASS, 22 C. 994.

House Trespass.

See CRIMINAL TRESPASS, 22 C. 123.

Hundi.

Suit on—See JURISDICTION, 22 C. 451.

Illegal Contract.

As opposed to public policy—See EXECUTOR, 22 C. 14.

Immoveable Property.

(1) Delivery of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 179.

(2) *Hat, Lease of—General Clauses Act* (*I of* 1868), *s.* 2, *cl.* 5—*Transfer of Property Act* (IV *of* 1882), *s.* 107—*Suit for rent, Decree for use and occupation in—Plaint, Amendment of—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 53.—A suit was brought for rent of a *hat* on the basis of a verbal settlement for three years at an annual *jama* of Rs. 370. The defendants denied the settlement. The first Court found for the plaintiff; but, on appeal, an objection having been raised by the defendants that the verbal lease was illegal under the Transfer of Property Act, the suit was dismissed. *Held*, a *hat* is a benefit arising out

Immoveable Property—(*Concluded*). PAGE

of land, and, therefore, within the definition of immoveable property as given in s. 2, cl. 5 of the General Clauses Act (I of 1868). The lease of a *hat* comes within s. 107 of the Transfer of Property Act (IV of 1882), and can be effected only by a registered instrument. *Held*, also, that a decree for use and occupation of the land by the defendants could not be granted in this case, as that would amount to an amendment raising issues of an entirely different character from those on which the trial was held in the Courts below as a suit for rent, and necessitating a trial upon fresh evidence. Such amendment could not be allowed under s. 53 of the Civ. Pro. Code. SURENDRA NARAIN SINGH v. BHAI LAL THAKUR, 22 C. 752 ... 499

Imprisonment.

(1) In default of payment—See HINDU LAW (MAINTENANCE), 22 C. 291.

(2) In default of payment of compensation—See ACT I OF 1871 (CATTLE TRESPASS), 22 C. 139.

(3) See SANCTION FOR PROSECUTION, 22 C. 586.

Incumbrance.

(1) Duty of mortgagee in searching for prior—See TRANSFER OF PRO- ACT (IV OF 1882), 22 C. 185.

(2) Mode of annulling—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 364.

(3) See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 244.

Injunction.

Temporary—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 459.

Insanity.

Subsequent to inheriting of property—See HINDU LAW (INHERITANCE), 22 C. 864.

Insolvent Debtor.

Representative of—See REPRESENTATIVE, 22 C. 259.

Inspection.

(1) And discovery of document—See PRACTICE, 22 C. 891.

(2) *Of documents—Affidavit of documents, Sufficiency of—Practice—Right to put in further affidavit in support of claim of privilege where original affidavit is not sufficient—Documents referred to in pleadings, as stating facts on which party setting them up relies.*—Where an affidavit of documents stated, with regard to certain documents of which the plaintiffs asked for inspection, that the defendants objected to produce them for inspection "because such documents were obtained after dispute arose, and for purposes of litigation that might arise, between them and the plaintiffs:" *Held*, in an application for their production and inspection, that the affidavit was not sufficient to support the defendant's claim to privilege. *Held*, also, in such an application the party claiming privilege is entitled to put in and use a further affidavit in support of the claim of privilege, aud is not confined to the grounds made in the affidavit in which the claim is first set up. Where, however, the party comes into Court relying on the original affidavit as sufficient to support his claim of privilege, but asks the Court, if it should think otherwise, for leave

Inspection—(*Concluded*). PAGE

to put in a further affidavit in support of his claim, *quære*, whether he should be allowed to do so. In a suit brought in January 1884 to recover money for work done and materials supplied in the erection of certain mills for the defendants, in which the defence was that the quality of the work was inferior to that contracted for, and the defendants stated in their written statement that, "in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs, they caused the same to be inspected by two independent engineers, in the month of July 1893 and they at once discovered such extensive defects therein that the costs of making good such defects will far exceed any possible sum due to the plaintiffs." *Held*, that the defendants could not set up a claim of privilege for the reports of the two engineers. Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit, and then sets up those facts by way of answer to the plaintiff's claim, he cannot afterwards attempt to make the case that the documents are confidential and intended merely for his legal advisers, or for the purpose only of evidence in the case. UMBICA CHURN SEN v. BENGAL SPINNING AND WEAVING COMPANY, 22 C. 105 .. 72

Instalment Decree.

For payment of money by—See EXECUTION OF DECREE, 22 C. 859.

Insurance Company.

Registered in England and carrying on business by Agent in Calcutta—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 22 C. 581.

Intention.

(1) Proof of—See PENAL CODE (ACT XLV OF 1860), 22 C. 164.

2) To commit offence—See CRIMINAL TRESPASS, 22 C. 391, 994.

Interest.

At high rate—Penalty—Contract Act (IX *of* 1872), *s.* 74—*Precise sum not named but ascertainable.*—A mortgage bond contained the following stipulations as to interest : "I will pay interest for the said amount at the rate of Re. 1-4 per cent. *per mensem*, and at the end of a year from the date of the bond, I will pay the whole amount of interest due on the principal for that year. If I do not pay the interest in this way at the end of each year, I will be guilty of neglect. You will by instituting suit realize interest upon the arrears of interest (which will be regarded as principal) and upon the principal mentioned in the bond at the rate of rupees 3-2 per cent. *per mensem* from the mortgaged property and from me, my heirs, assigns, and representatives and from my other properties. I will continue to pay interest upon the principal for every year from the date of the bond at the end of that year so long as the amount of the bond is not paid. In default of payment you will act according to the conditions stated above. I will repay this money within three months from date and redeem the mortgage property and mortgage bond.........If I fail to pay up the principal money within the said specified time I will continue

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to pay up interest upon the principal at the rate of Re. 1-4 per cent, according to the said stipulation in the bond up to the date of the institution of the suit, and from the date of institution of the suit to that of the decree, and from the date of the decree to that of the realization of the amount:" *Held*, that the plaintiff was not entitled to the higher rate of interest, it being in the nature of a penalty within the meaning of s. 74 of the Contract Act, and this was so, although no sum was named within the meaning of that section, because such sum was at once ascertainable. BAID NATH v. SHAMANAND DAS, 22 C. 143 ... 97

Issue.

Not in terms fixed, but afterwards raised—See PLEADINGS, 22 C. 324.

Jagir.

Granted to Gorait or Village Watchman—See SERVICE TENURE, 22 C. 938.

Joinder.

Of plaintiffs—See MISJOINDER, 22 C. 833.

Joint Proprietor.

Suit by, for arrears of rent—See CONTRACT ACT (IX OF 1872), 22 C. 658.

Judgment.

(1) And decrees of Courts of Foreign States, Suits on—See FOREIGN COURT, 22 C. 222.

(2) *Form and contents of judgment—Criminal appeal, Judgment in—Crim. Pro. Code*, 1882, *ss*. 367, 424.—A Deputy Commissioner after hearing an appeal from a Deputy Magistrate who had convicted the appellants of rioting, gave the following judgment: "After hearing the arguments of the pleader for the appellants and examining the record I am of the opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe. Appeal dismissed." *Held*, that this was not a judgment within the meaning of ss. 367 and 424 of the Crim. Pro. Code, and that the appeal must be reheard. FARKAN v. SOMSHER MAHOMED, 22 C. 241 ... 161

Judgment-debtor.

Death of—See EXECUTION OF DECREE, 22 C. 558.

Judicial Possession.

See SPECIFIC RELIEF ACT (I OF 1877), 22 C. 562.

Judicial Separation.

Previous decree for—See DIVORCE, 22 C. 544.

Jurisdiction.

(1) *Bengal, N. W. P. and Assam Civil Courts Act* (XII *of* 1887), *s*. 13, *cl*. (3)—*Civ. Pro. Code* (XIV *of* 1882), *s*. 25—*Sale in execution of decree for sale—Transfer of Civil case*.—A suit on a mortgage bond, praying for a decree for sale, was transferred under s. 25 of the Civ. Pro. Code from the Court of the Second Subordinate Judge to that of the Third Subordinate Judge in the district for trial in that Court. The suit was decreed, and an order for sale

Jurisdiction—(*Concluded*). PAGE

was passed by the Third Subordinate Judge. After the sale an application was made to set it aside on the ground, *inter alia* that the Court of the Third Subordinate Judge had no jurisdiction to sell the property, it being within the local jurisdiction of the second Subordinate Judge's Court. The jurisdiction of the Third Subordinate Judge to try the *suit* was not questioned. *Held* that s. 13, cl. (3) of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887) dealt with matters of this description and the Court which passed the decree and the order for sale had jurisdiction to hold the sale. JAGERNATH SAHAI v. DIP RANI KOER, 22 C. 871. ... 577

(2) Of Civil Court—See REGULATION III OF 1872 (SONTHAL PERGUNNAHS SETTLEMENT), 22 C. 473.

(3) Of Foreign State—See FOREIGN COURT, 22 C. 222.

(4) *Public right of way—Special injury—Cause of action—Right of suit.*—In a suit for the removal of an obstruction in a public pathway, it was found by the Courts below that the plaintiffs were deprived of the only means of grazing their cattle by the obstruction, and that they lost some cows thereby. It was contended, on behalf of the defendant on second appeal, that such damage would not entitle the plaintiffs to maintain a suit in the Civil Court. *Held*, that the injury caused to the plaintiffs, by the obstruction of the way, leading from the village, where they resided to that in which they had their fields and pastures, was peculiar to them and to their calling, and it caused them substantial loss of time and inconvenience; and that it was sufficient to entitle the plaintiffs to maintain the action. *Held*, also, that the death of the cows was too remotely and indirectly connected with the obstruction to furnish a cause of action. ABZUL MIAH v. NASIR MAHOMMED, 22 C. 551 ... 367

(5) *Suit on* Hundi—*Cause of action—Endorsement by payee.*—A *hundi* drawn at Benares on the drawer's firm at Bombay in favour of a firm at Mirzapur and Calcutta was endorsed at Calcutta by the payee to a firm at Calcutta and dishonoured by the drawer's firm at Bombay. In a suit brought in Calcutta by the endorsee to recover the value of the *hundi*, the defence was raised that the Court had no jurisdiction to entertain the suit. *Held*, that the endorsement having taken place in Calcutta, part of the cause of action arose in Calcutta, so as to give the Court jurisdiction. ROGHOONATH MISSER v. GOBINDNARAIN, 22 C. 451 ... 301

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 483.

(7) See EXECUTION OF DECREE, 22 C. 764.

(8) See MESNE PROFITS, 22 C. 434.

Kabuliat.

Executed prior to Bengal Tenancy Act—See CONTRACT ACT (IX OF 1872), 22 C. 658.

Land Acquisition Act (X of 1870).

Suit for compensation—Buildings on land—Ownership in land and buildings—Landlord and tenant—Transfer of Property Act (IV *of* 1882), *s.* 108, *cl.* (*h*).—A plot of land was acquired under Act X of 1870 for the construction of a road within the town

Land Acquisition Act (X of 1870)—(*Concluded*). PAGE

of Calcutta; the tenants, who had erected masonry buildings on portions of the land, and who were in possession at the time of the acquisition, claimed before the Collector the value of their interests; but the owner of the land claiming the whole of the compensation money, the matter was referred to the District Judge, who found that the lands were originally granted for building purposes, and who allowed a share of the compensation money, *viz.*, the value of the buildings, to the tenants. On appeal to the High Court by the owner of the land on the ground that the respondents' tenures, which were of a temporary character, having come to an end when the land was acquired by the municipality, the buildings standing on the land became his property, and that the tenants were not entitled to compensation. *Held*, that the Judge came to a right finding on the facts, and that the owner of the land was not entitled to the buildings erected by the tenants without being liable to pay them compensation, even if the tenancy had come to an end. *Held* also, that, as the land was acquired by the Corporation during the continuance of the lease, in the sense that the relationship of landlord and tenant was still subsisting between the parties, and having regard to s. 108, cl. (*h*) of the Transfer of Property Act, which applies to Calcutta as well as to the mofussil, the tenants were entitled to the compensation for the buildings. DUNIA LALL SEAL v. GOPI NATH KHETRY, 22 C. 820 ... 543

Landlord and Tenant.

(1) *Property in trees growing on land—Bengal Tenancy Act* (VIII *of* 1885), *s.* 23—*Right of occupancy tenant to cut down trees—Right of occupancy tenant to appropriate trees when cut down—Onus of proof—Custom—Suit for damages.*—The property in trees growing on land is, by the general law, vested in the proprietor of the land, subject, of course, to any custom to the contrary. Under s. 23 of the Bengal Tenancy Act the *onus* is on the landlord to show that a tenant with occupancy right is debarred from cutting down the trees on the land, and not on the tenant to prove a custom giving him the right to do so. The right to appropriate them when cut down, however, is a different question. In a suit by landlords against their tenants, who had a right of occupancy, for appropriating some mango trees growing on their land which they had cut down; *Held* that the *onus* was rightly thrown on the tenants of proving a custom they alleged, giving them the right to sell the trees, and, on failure to prove such custom, they were liable to damages for so appropriating them. NAFAR CHANDRA PAL CHOWDHURI v. RAM LAL PAL, 22 C. 742 ... 493

2) See LAND ACQUISITION ACT (X OF 1870), 22 C. 820.

Law of Equity and Good Conscience.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 8.

Lease.

(1) Of endowed property—See HINDU LAW (RELIGIOUS ENDOWMENTS), 22 C. 989.

(2) Of non-agricultural character—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 494.

Legal Representative. PAGE

See REPRESENTATIVE, 22 C. 259.

Legislature.

Proceedings of—See STATUTES, 22 C. 1017.

Leprosy.

Disqualification of Mohant on account of—See HINDU LAW (RELIGIOUS ENDOWMENTS), 22 C. 843.

Lessee.

Liability of, for rent after transfer—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 494.

Letter.

Written by Guru outcasting member of caste—See DEFAMATION, 22 C. 46.

Letters of Administration.

Application for—See PRACTICE, 22 C. 491.

Letters Patent, High Court.

Ss. 39, 40—See APPEAL TO PRIVY COUNCIL, 22 C. 928.

License.

(1) False statement in application for—See ACT III OF 1884 (BENGAL, MUNICIPAL), 22 C. 131.

(2) Tax, liability to pay—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION), 22 C. 581.

Limitation.

(1) Period from which it runs—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 644.

(2) *Suit for damages for misappropriation of crops —Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 36, 39, 48, 49 *and* 109.—In a suit for damages for misappropriation of paddy grown on plaintiff's land, on the allegation that the defendants had wrongfully and forcibly reaped and misappropriated the crops, defendants pleaded limitation of two years under art. 36 of sch. II of the Limitation Act (XV of 1887). *Held* by NORRIS and GHOSE, JJ. (RAMPINI, J., dissenting), that the suit was not barred by limitation under art. 36. *Held* by NORRIS, J. (without expressing any opinion on the applicability or otherwise of arts. 39, 49 and 109) that all the conditions existed in this case to bring it within art. 48 of sch. II of the Limitation Act. *Held* by GHOSE, J.—Regarding the suit as one for compensation for the wrongful act on the part of the defend ants in cutting the crops on the plaintiff's ground, art. 39 would save a portion of the plaintiff's claim from being barred by limitation. If, however, it is regarded simply as a suit for damages for carrying away and misappropriating the crops, the case would fall under art. 49. *Held* by RAMPINI, J.—None of the arts. 39, 49 and 109 applied to this case, and the suit was barred by the provision of art. 36. SURAT LALL MONDAL v. UMAR HAJI, 22 C. 877 ... 580

(3) See ACT VIII OF 1885 (BENGAL TENANCY), 22 C. 244.

Limitation Act (XV of 1877).

(1) *Adverse possession—Hindu widow—Reversionary heir.*—A Hindu proprietor died, leaving a widow, and also a son who died, leaving a

Limitation Act (XV of 1877)—(*Continued*). PAGE

widow, a few years after his father, whose widow, either during the son's lifetime, or on his death, took possession of the property left by the father, and remained in possession till she died, having held about seventeen years. This she did notwithstanding the claim of the son's widow, whose suit against her for the property was dismissed, on the ground of limitation in 1875. Before her death she transferred part of the property by gift, and was said to have transferred another part by will. On a question as to the capacity in which she had taken and retained possession, it was found that she had done so absolutely and without any assertion of a right, which she had not, to a widow's estate. Suits by the reversionary heirs, whom the son's widow joined, were held barred by limitation, on the ground that the possession taken had been adverse to them. Not only was any claim, through the deceased son, barred but the rights of the reversionary heirs also, the possession by the father's widow not having been shown to be that of the limited interest of a widow. LACHHAN KUNWAR v. MANORATH RAM : LACHHAN KUNWAR v. ANANT SINGH, 22 C. 445 (**P.C.**) = 22 I. A. 25 = 6 Sar P.C.J. 523 = 5 M.L.J. 1 = Rafique & Jackson's P.C. No. 136 ... 297

(2) Sch. II, arts. 36, 39, 48, 49 and 109—See LIMITATION, 22 C. 877.

(3) *Arts.* 57, 120—*Suit on pledge of moveable property—Prayers in plaint both for personal decree, and for right to enforce charge against property pledged.*—A suit on a pledge of certain moveable property, made in respect of a loan of money on the 10th February 1877, was instituted on the 14th December 1891. The plaint prayed for a decree for the money lent against the defendant personally, and also that the charge might be enforced against the article pledged. *Held* that so far as the prayer for a personal decree was concerned, the suit was governed by art. 57 of sch. II of the Limitation Act, and was barred ; but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell not within that article but within art. 120 of the same schedule, and was therefore not barred. NIM CHAND BABOO v. JAGABUNDHU GHOSE, 22 C. 21 ... 15

(4) *Art.* 84—*Taxed costs of an attorney, suit for—Suit or particular business, meaning of.*—Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application itself. Where a firm of attorneys brought a suit against their clients to recover the costs of an application to the High Court : *Held*, that limitation began to run from the date of the judgment in the application. Items of an attorney's bill for work done, subsequently to the judgment in opposing the taxation of the opponent's costs, although done on his client's instructions, will not take the matter out of the Limitation Act. Such items do not form part of the costs of the original application. WATKINS v. FOX, 22 C. 943 ... 626

(5) *Arts.* 118 *and* 141—*Adoption—Practice among the Gayawals of Gya of adopting sons—Findings of fact on documentary evidence apart from construction—Concurrent decisions on facts—Privy Council, practice of.*—Against a claim for the proprietary right by inheritance brought by the nearest *bandhu*, or cognate heir, of the

Limitation Act (XV of 1877)—(*Continued*). PAGE

deceased, the defendant, in possession, set up his adoption by the widow under her husband's authority. The Courts below had found that no such authority had been given, and that the widow, not adopting to her husband, had adopted the defendant as her son. *Held*, that on the facts found, this was not a suit to which limitation under art. 118, sch. II, Act XV of 1877, was applicable. The Courts below had also concurred in finding against the fact of a *dattaka* adoption having taken place, which would have had the effect of removing one of the plaintiff's ancestors into another family, whereby a necessary link in the succession would have been lost to the plaintiff's title had this adoption been proved. As a ground for interference with these findings of fact, it was suggested that the evidence consisted, in a great measure, of documents of which the construction had been matter for decision, thus rendering the questions to be other than of fact, but it was held that they turned on the effect of the evidence afforded by the documents, and not on the construction, so that there was no reason for departing from the ordinary rule as to the concurrence of two Courts upon fact. The proved practice of the Gayawals in adopting sons did not sever the adopted child from the family of his natural father so that he did not lose his rights therein. LAKSHMAN LAL CHOWDHRI v. KANHAYA LAL MOWAR, 22 C. 609 (P.C.) = 22 I.A. 51 = 6 Sar. P.C.J. 558 ... 405

(6) *Art.* 127—*Joint family property—Suit by Mahomedan for possession of shares by inheritance.*—Art. 127 of sch. II of the Limitation Act (XV of 1877) does not apply to a suit by Mahomedans for possession by right of inheritance of shares in the property of their deceased ancestor. MAHOMED AKRAM SHAHA v. ANARBI CHOWDHRANI, 22 C. 954 ... 633

(7) *Art.* 178—*Transfer of Property Act* (IV *of* 1882), *s.* 89—*Application for an order absolute for sale of mortgaged property.*—An application under s. 89 of the Transfer of Property Act (IV of 1882) to have a mortgage-decree for sale made absolute is not governed by art. 178, sch. II of the Limitation Act, 1877. That article is limited to applications under the Code of Civil Procedure. In dealing, however, with such an application, the Court may be guided by considerations as to whether any delay on the part of the mortgagee has not been unreasonable, so as to bring it within the rules applied in such cases by Courts of Equity. So long as the final order for sale is not passed the suit may properly be regarded as pending. TILUCK SINGH v. PARSOTEIN PROSHAD, 22 C. 924. ... 612

(8) Arts. 178, 179—See PARTITION, 22 C. 425.

(9) Art. 179—See ACT VIII OF 1885 (BENGAL TENANCY), 22 C. 644.

(10) *S.* 179, *cl.* 4—*Application for transfer of decree—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 223—*Step-in-aid of execution of a decree.*—An application to the Court which passed a decree, for its transfer to another Court for execution under s. 223 of the Civ. Pro. Code, is a step-in-aid of execution, and sufficient to keep the decree alive within the meaning of the Limitation Act, sch. II, art. 179, cl. 4. CHUNDRA NATH GOSSAMI v. GURROO PROSUNNO GHOSE, 22 C. 375 ... 251

Limitation Act (XV of 1877)—(*Concluded*). PAGE

(11) *S.* 179, *cl.* 4—*Application to receive poundage fee—Application for the return of a decree partially executed by the Court where transferred for execution—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 223—*Step in-aid of execution of a decree.*—Neither an application by a decree-holder to receive poundage fees from him in respect of some of his judgment-debtor's property purchased by himself, nor an application for the return to the decree-holder of a decree made to a Court to which it has been transferred for execution, and by which it has been partially executed, is a step-in-aid of execution within the meaning of the Limitation Act, sch. II, art. 179, cl. 4. AGHORE KALI DEBI v. PROSUNNO COOMAR BANERJEE, 22 C. 827 547

(12) *Art.* 180—*Execution of decree—Revivor—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 223, 230, 248.—*A* obtained a decree against *B* on the Original Side of the High Court on the 19th December 1881. On the 11th December 1893, the judgment-creditor applied to the Court under s. 223 of the Code of Civil Procedure for "transmission of a certified copy of the decree in the District Judge's Court of the 24-Pergunnahs, with a certificate that no portion of the decree has been satisfied by execution within the jurisdiction" of the High Court, and alleging that the judgment-debtor had no property within its jurisdiction, but had property in the 24-Pergunnahs. The application was headed as an application for execution and was in a tabular form. Upon this a notice was issued under s. 248 (*a*) of the Code, and the judgment-debtor not having shewn any cause, on the 19th December 1893 a certified copy was ordered to be issued. The certified copy of the decree having been transmitted, the judgment-creditor, on the 1st March 1894, applied for the execution of the decree to the District Judge. On the objection of the judgment-debtor that the execution was barred by limitation: *Held*, that the application of the 11th December 1893 was not an application for execution, and also that the order of the 19th December 1893 was not an order for execution and could not operate as a revivor of the decree within the meaning of art. 180, sch. II of the Limitation Act. There was no necessity for the issue of a notice under s. 248 upon the application to transfer a decree under s. 223 of the Code, and on that application execution could not have been obtained upon the order of the 19th December 1893. The first application for execution was that made on 1st March 1894, to the Court to which the certified copy of the decree was transmitted, and that was not within time. The execution of the decree was therefore barred by limitation. SUJA HOSSEIN *alias* REHAMUT DOWLAH v. MONOHUR DAS, 22 C. 921 ... 610

List of Voters.

See MUNICIPAL ELECTION, 22 C. 717.

Local Government.

Rules of—See MUNICIPAL ELECTION, 22 C. 717.

Lunatics.

Care of estates of—See RIGHT OF SUIT, 22 C. 729.

Lurking House Trespass by Night.

See CRIMINAL TRESPASS, 22 C. 391.

Magistrate. PAGE

(1) Opinion of, reference to, by Sessions Judge in judgment—See CONVICTION, 22 C. 805.

(2) Order by—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 751.

(3) Power of, to transfer or withdraw cases—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 898.

Mahomedan Law.

1.—CUSTOM.

2.—GIFT.

3.—INHERITANCE.

4.—WAKF.

———**1.—Custom.**

See PLEADINGS, 22 C. 324.

———**2.—Gift.**

For charitable purposes, Illusory—See MAHOMEDAN LAW (WAKF), 22 C. 619.

———**3.—Inheritance.**

Suit by, Mahomedan for possession of share by—— See LIMITATION ACT (XV OF 1877), 22 C. 954.

———**4.—Wakf.**

(1) *Deed invalid as a* wakfnama—*Attempted family settlement in perpetuity—Ultimate, but illusory, gift for charitable purposes.*—An instrument, nominally a *wakfnama* expressly purporting to make property *wakf*, settled it in perpetuity on the family of the dedicators, with an ultimate gift for the benefit of the poor, only to take effect upon the failure of the descendants of the family. *Held*, that a gift to the poor might be illusory from the smallness of the amount, or from its uncertainty or remoteness ; and that the period when this gift was to take effect was so uncertain, and probably so remote, that the gift was illusory. Therefore according to Mahomedan law, it did not establish a *wakf*. 17 C. 498=17 I. A. 28; 17 B. 1=19 I. A. 170, referred to and followed as to the principle that the charitable purpose, in order to establish a *wakf*, must be substantial and not illusory. Provision for the dedicator's family, out of the appropriated property, may be consistent with the making a valid *wakf*, where the appropriation is substantially for a pious or charitable purpose. But, as family settlement in perpetuity is contrary to the Mahomedan law, and as successions of inalienable life interests are forbidden, such dispositions cannot be rendered legal by the mere addition of the words that they are made as *wakf*, or for the benefit of the poor where no substantial benefit is conferred on the latter. ABDUL FATA MAHOMED ISHAC v. RASAMAYA DHUR CHOWDHRI, 22 C. 619 (P.C.)=22 I. A. 762=6 Sar P. C. J. 572 ... 413

(2) Religious Institution, Appointment of Sajjadanashin of—See PLEADINGS, 22 C. 324.

Manager.

Of estate—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 634.

Marriage. PAGE

Evidence in suit for dissolution of—See DIVORCE, 22 C. 544.

Mesne Profits.

(1) *Order giving mesne profits not awarded by decree—Jurisdiction—Condition in a bond unfulfilled.*—An order assumed to be made by a Court in execution, that the decree-holders should have mesne profits which had not been awarded in their decree, was without jurisdiction, and could not be regarded as taking effect. This order was afterwards reversed, as having been made without jurisdiction, but was standing when the bond in suit was executed by the decree-holders, now defendants, admitting money to be due to the plaintiff, and, as to a particular sum, promising payment out of the mesne profits when realized by them. The decree-holders afterwards compromising with their judgment-debtor, abandoned the claim to mesne profits. This, however, was no real concession, because the right to mesne profits had no existence. Although the unqualified admission of a debt implies a promise to pay it, yet this implication does not necessarily follow where there is an express promise to pay in a particular manner, and on a certain event happening. *Held*, on the construction of the bond, that here the admission was referable to the particular obligation agreed to be discharged only in the manner stipulated ; and that, therefore, the payment was to be contingent on there being mesne profits. *Held*, also, that it had not been established that the non-occurrence of the condition had been occasioned by the conduct, or default, of the defendants, and that, therefore, the objection to pay the sum in question never took effect, or became enforceable. KALKA SINGH v. PARAS RAM, 22 C. 434 (P.C.)=22 I.A. 68 =6 Sar. P.C.J. 545=5 M.L.J. 14=Rafique and Jackson's P.C. No. 137 ... 290

(2) Payable under a decree against a Hindu widow and other defendants —See HINDU LAW (WIDOW), 22 C. 974.

(3) Suit for recovery of—See RIGHT OF SUIT, 22 C. 501.

Minor.

(1) Buying, for purpose of prostitution—See PENAL CODE (ACT XLV OF 1860), 22 C. 164.

(2) Contract against, suit to enforce—See SPECIFIC PERFORMANCE, 22 C. 545.

(3) Suit brought by next friend of—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 8.

(4) Suit instituted by next friend on behalf of—See PRACTICE, 22 C. 270.

(5) See PRACTICE, 22 C. 891.

Minor Offence.

Conviction of, without formal charge—See CRIM. PRO. CODE (ACT XIV OF 1882), 22 C. 1006.

Misappropriation.

Crops, suit for damages for—See LIMITATION, 22 C. 877.

Misjoinder. PAGE

Civ. Pro. Code (*Act* XIV *of* 1882), *ss.* 26, 27 *and* 31—*Joinder of plaintiffs—Persons jointly interested to a suit—Claims not antagonistic—Cause of action, Meaning of—Plaint, Amendment of—Parties.*—The plaintiffs 1 to 4 were the daughters and daughter's sons of one *G*. They alleged that *G* died, leaving an infant son *X* and infant daughter *H* and a widow *C*: that the son died leaving *C* as heir, and that upon *C*'s death, the sons of *H* became entitled to the property of *X*, but that should it appear that *G* did not leave *X* as his heir, *H* would succeed to the estate of *G* as next heir; and that the plaintiffs jointly granted a *putni* settlement of the property to one *B* (plaintiff No. 5), but he was kept out of possession by the defendant who claimed it by purchase from the representatives of *P*, brother of *G*. The plaintiffs 1 to 5 joined in bringing the suit which was for possession of the property upon establishment of title either of plaintiff No. 1 or of plaintiffs Nos. 2, 3, and 4. On the objection of the defendant under s. 26 of the Code of Civil Procedure, that the suit was not maintainable for misjoinder of plaintiffs, *held*, that the expression "cause of action" occurring in s. 26 of the Code is used, not in its comprehensive but in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself, so that the qualification implied in the words "in respect of the same cause of action" will be satisfied, if the facts, which constitute the infringement of right of the several plaintiffs, are the same, though the facts constituting the rights upon which they base their claim to that relief in the alternative may not be the same; and that as the plaintiffs in the case complained of the same wrongful act of the defendant constituting the infringement of their right, that was their cause of action, and as they all claimed the same relief, namely, possession, and further as they did not advance any antagonistic claim, such a case came within s. 26 of the Code, and was not bad for misjoinder of plaintiffs. HARAMONI DASSEE v. HARI CHARAN CHOWDHRY, 22 C. 833 ... 551

Mitakshara Law.

(1) See HINDU LAW (INHERITANCE), 22 C. 339, 864.
(2) See HINDU LAW (JOINT FAMILY), 22 C. 410.

Mohant.

Succession of—See HINDU LAW (RELIGIOUS ENDOWMENT), 22 C. 843.

Money.

Paid for benefit of another—See VOLUNTARY PAYMENT, 22 C. 28.

Mortgage.

1.—GENERAL.
2.—SALE.
3.—SIMPLE.

——1.—**General.**

(1) Bond, Suit on by heir—See SUCCESSION CERTIFICATE ACT (VII OF 1879), 22 C. 143.
(2) Of joint family property by Committee in lunacy under Act XXXV of 1858—See HINDU LAW (INHERITANCE), 22 C. 864.
(3) Suit on, for an account and for sale of mortgaged property—See PRACTICE, 22 C. 100.

Mortgage—2.—Sale. PAGE

Sale of mortgaged property—Suit for sale of mortgaged property without redeeming prior mortgage—Form of decree—Transfer of Property Act (IV *of* 1882), *ss.* 48, 58, 60, 67, 74, 85, 86, 88, 89, 91, 92, 96, 97.—In a suit on a mortgage by a second mortgagee to which the prior mortgagee was a party and in which the plaintiff prayed that the amount due to him might be realized by a sale of the mortgaged property, the Courts below dismissed the suit, holding that the plaintiff was not entitled to sell the mortgaged property without redeeming the prior mortgage: *Held*, that this decree was erroneous, and that the plaintiff was entitled to an order for sale of the mortgaged property subject to the lien of the prior incumbrancer. The words "immoveable property" in s. 58 of the Transfer of Property Act denote, having regard to the definition of "immoveable property" in s. 2, cl. 5 of the General Clauses Consolidation Act (I of 1868), not only the property itself as distinguished from any equity of redemption which the mortgagor might possess in the property, but include the rights of the mortgagor in the property mortgaged at the time of the second mortgage, or, in other words, his equity of redemption in such property. A second mortgage therefore is, as well as a first mortgage, a mortgage of "specific immoveable property" under s. 58. The case of 4 M. 213; 1 A. 240; 8 A. 105; 8 M. 246 and 18 C. 164; 17 I.A. 201, referred to and approved as to the right of a second mortgagee to a sale, subject to the lien of a prior mortgagee. KANTI RAM v. KUTUBUDDIN MAHOMED, 22 C. 33 ... 24

———3.—Simple.

Execution of decree—Simple mortgage—Decree nisi—*Order absolute—Transfer of Property Act* (IV *of* 1882), *ss.* 88, 89.—A decree on a simple mortgage directing the sale of mortgaged property on default of payment within a fixed period is substantially a decree *nisi* or conditional decree under s. 88 of the Transfer of Property Act, and cannot be executed unless it is made absolute by an order under s. 89 of that Act. TARA PROSAD ROY v. BHOBODEB ROY, 22 C. 931 617

Mortgaged Property.

(1) Application for attachment and sale of, in execution of decree—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 813.

(2) Application for order absolute for sale of—See LIMITATION ACT (XV OF 1877), 22 C. 924.

(3) Order absolute for sale of—See MORTGAGE (SIMPLE), 22 C. 931.

Mortgagee.

(1) And mortgagor—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 364.

(2) Duty of in searching for prior incumbrances—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Moveable Property.

Suit on pledge of—See LIMITATION ACT (XV OF 1877), 22 C. 21.

Municipal Commissioner.

(1) Election of—See MUNICIPAL ELECTION, 22 C. 717.

(2) Powers of, to institute prosecution under Penal Code—See ACT III OF 1884 (BENGAL, MUNICIPAL), 22 C. 131.

Municipal Election. PAGE

Specific Relief Act (I *of* 1877), s. 45—*Election law—Calcutta Municipal Consolidation Act* (*Bengal Act* II *of* 1888), ss. 8, 14, 20, 21, 22, 23, 31, 32—*Municipal Commissioner, Election of—List of voters—Chairman, Jurisdiction of*—Quo Warranto—*High Court, Jurisdiction of—Rules of Local Government.*—There is nothing in the Calcutta Municipal Act (Bengal Act II of 1888), or in the Local Government Rules issued under s. 19 of the Act, which requires that the name of a candidate, or of the proposer, seconder, or approver of a candidate, at a Municipal election, should be published in the revised list of voters. Sections 20 and 23 of the Act only lay down rules applicable to voters; they do not control the qualifications of proposers, seconders, or approvers. Sections 8, 14, 20, 21, 22, 23, 31, 32 discussed. *Semble*—The High Court has jurisdiction by a proceeding in the nature of a *quo warranto* to restrain a person who has not been duly elected from exercising the functions of a duly elected Commissioner. The Chairman has no judicial discretion in preparing the list of candidates. Under s. 31 of the Act every candidate for election must send in his name to the Chairman not less than seven days before the day fixed for election, together with the names of his proposer, seconder, and approvers. The Chairman has no power to waive this rule. Where there is a *prima facie* compliance with s. 31 of the Act, the Chairman has no power to go further and determine questions affecting the status of persons claiming to be candidates. The Chairman can only revise the original list of voters in the manner laid down by s. 22, or on applications made under s. 21 or in pursuance of an order from the Presidency Magistrate under s. 23. The issue of a supplementary list of voters is not sanctioned by the Act. A definition of the term "elector" with necessary qualifications is given in s. 8 of the Act. There is nothing in the Act preventing a person qualified to vote under s. 8 from voting, although his name does not appear on the revised list of voters. The only prohibition is that found in the Local Government Rules issued under s. 19 of Act. *In the matter of* CORKHILL, 22 C. 717 ... 476

Municipal License.

Tax, Liablity of Insurance Company to pay—See ACT II OF 1888, (CALCUTTA MUNICIPAL CONSOLIDATION), 22 C. 581.

Murder.

See UNLAWFUL ASSEMBLY, 22 C. 306.

Nazir.

Power of Delegation of—See PENAL CODE (ACT XLV OF 1860), 22 C. 596, 759.

Negligence.

Of next friend—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 8.

New Trial.

Second application for—See SMALL CAUSE COURT (PRESIDENCY TOWNS), 22 C. 784.

Next Friend.

(1) Negligence of—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 8.

(2) Suit instituted by, on behalf of minor—See PRACTICE, 22 C. 270.

Notice. PAGE

(1) Of Benami Holding—See SALE, 22 C. 909.

(2) Sufficiency of—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 77.

(4) To quit—See SERVICE TENURE, 22 C. 938.

Obstructing Public Servant.

See ACT VIII OF 1876 (ESTATES PARTITION BENGAL), 22 C. 286.

Occupancy Tenant.

Right of, to cut down and appropriate trees—See LANDLORD AND TENANT, 22 C. 742.

Offence.

Want of proof of commission of—See PENAL CODE (ACT XLV OF 1860), 22 C. 638.

Official Assignee.

See REPRESENTATIVE, 22 C. 259.

Order.

(1) Sale of mortgaged property—See MORTGAGE (SIMPLE), 22 C. 931.

(2) For monthly allowance, Breach of—See HINDU LAW (MAINTENANCE), 22 C. 291.

(3) Giving mesne profits not awarded by decree—See MESNE PROFITS, 22 C. 434.

(4) Granting review of judgment—See APPEAL (GENERAL), 22 C. 3, 984.

(5) In execution proceedings against mortgagor—See ACT VIII OF 1885, (TENANCY, BENGAL), 22 C. 364.

(6) Of commitment for trial—See COMMITMENT, 22 C. 1004.

(7) Of High Court in Criminal Case, Form of—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 297.

(8) Of Privy Council dismissing suit, Effect of—See APPEAL (TO PRIVY COUNCIL), 22 C. 1011.

(9) Of Privy Council, Error in—See APPEAL (TO PRIVY COUNCIL), 22 C. 960.

(10) Of Revenue Commissioner setting aside sale—See ACT VII OF 1880 (PUBLIC DEMANDS, RECOVERY, BENGAL), 22 C. 419.

(11) Petition for amendment of—See APPEAL (TO PRIVY COUNCIL), 22 C. 1011.

(12) Refusing appointment of Receiver—See APPEAL (TO PRIVY COUNCIL), 22 C. 938.

(13) Setting aside ex-parte decree—See APPEAL (GENERAL), 22 C. 981.

(14) Setting aside sale—See SALE, 22 C. 802.

(15) Staying execution of decree—See PRIVY COUNCIL, 22 C. 1.

Ownership.

In land and buildings—See LAND ACQUISITION ACT (X OF 1870), 22 C. 820.

Pardon.

Withdrawal of—Conditional pardon to prisoner—Power of Sessions Court to try person not committed—Approver, Evidence of—Crim. Pro. Code, ss. 162, 193, 337, 339, 374—*Evidence Act,* ss. 24, 30.—

Pardon—(*Concluded*). PAGE

Two persons, *J*, and *U*, were charged with the murder of *U's* husband, and in the course of the police enquiry made certain statements to the police. They were then sent up by the police to a Deputy Magistrate for enquiry. *J*. made three statements on the 28th of February, the 1st of March and the 9th of March 1894, respectively, two of which were confessions, the third being a withdrawal of such confessions. *U* also made two statements on the 2nd and 9th of March, the first of which was a confession, and the second a withdrawal thereof. On the 20th of April *U* was tendered a pardon, and was thereafter treated as an approver, in which capacity she gave evidence against *J*. *J* was then committed to the Court of Sessions to take his trial, *U* being sent up as an approver. In the Sessions Court, *U* resiled from her deposition before the committing Magistrate, and was then and there treated as an accused person and placed on her trial with the other accused and the deposition aforesaid was put in as evidence. Both accused were convicted mainly on their confessions, *J* of murder, and *U* of abetment of murder. *Held*, that the conviction of *U* was bad, the Court of Sessions having had no jurisdiction to try her, as she was never committed to that Court by any competent Magistrate: *Held* that the conviction of *J* was also bad—(1) Because *U's* statement to the police was not admissible in evidence. (2) Because her statements on the 2nd and 9th of March were not under the circumstances admissible in evidence, as she was not being legally tried jointly with him for the same offence. (3) Because her deposition on the 24th of April was not admissible in evidence, because, apart from other reasons *J* had no opportunity to cross-examine her. (4) Because *J's* confession under the circumstances was not a free and voluntary admission of guilt. *Held*, on the whole case that independently of the aforesaid statements and confessions, there was not sufficient evidence to justify the conviction. QUEEN-EMPRESS v. JAGAT CHANDRA MALI, 22 C. 50 ... 35

Parties.

(1) Proof of identity of—See DIVORCE, 22 C. 544.
(2) Substitution of—See ABATEMENT, 22 C. 92.
(3) Substitution of—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 22 C. 143.
(4) See MISJOINDER, 22 C. 833.
(5) See REPRESENTATIVE, 22 C. 259.

Partition.

Decree in suit for partition—Code of Civil Procedure, (Act XIV *of* 1882), *s.* 396*—Application for effecting partition—Limitation Act,* (XV *of* 1877), *sch.* II, *arts.* 178 *and* 179.—Plaintiffs obtained a decree for partition in 1885, and first made an application to have the partition effected by an arbitrator in 1886. This application was struck off, and a second application was made on 23rd July 1888. The arbitrator then declined to act, and the application was struck off. The present application was made on the 1st August 1891, and an objection was raised that more than three years having elapsed from the date of the previous application, the present one was barred under art. 179 of sch. II of the Limitation Act. The lower Court of Appeal held that art. 178,

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and not art. 179, applied to the case, but that the plaintiff having applied within three years from the date when the arbitrator declined to act, the application was in time: *Held*, with reference to the provisions of s. 396 of the Code of Civil Procedure, that the proceedings for the purpose of effecting the partition were proceedings in the suit itself and not proceedings in execution of the decree; that no formal application was necessary, the Court being bound to proceed with the suit and make a final decree; and that the application made on the 1st August 1891 was not one to which limitation was applicable. DWARKA NATH MISSER v. BARINDA NATH MISSER, 22 C. 425 ... 284

Partnership.

See RES JUDICATA, 22 C. 692.

Payment.

Of decretal amount by one co-sharer to set aside sale—See CO-SHARERS, 22 C. 800.

Penal Code (Act XLV of 1860).

(1) *Ss.* 21 & 186—*Escape from arrest—Nazir's power of delegation—Public servant.*—A Nazir has authority to delegate the execution of warrants of arrest. A peon acting under such delegation is a public servant within the meaning of the definition in s. 21, cl. 4 of the Penal Code. *Quære.*—Whether the escape of a prisoner from arrest is an obstruction of a public servant within the meaning of s. 186 of the Penal Code. SHEO PROGASH TEWARI v. BHOOP NARAIN PROSAD PATHAK, 22 C. 759 ... 504

(2) Ss. 23, 24—See THEFT, 22 C. 1017.

(3) S. 84—See CONFESSION, 22 C. 817.

(4) Ss. 147, 148—See RIOTING, 22 C. 276.

(5) S. 149—See RIOTING, 22 C. 276.

(6) S. 149—See UNLAWFUL ASSEMBLY, 22 C. 306.

(7) S. 182—See Act III of 1884 (BENGAL MUNICIPAL), 22 C. 131.

(8) S. 186—See ACT VIII of 1876 (ESTATES PARTITION, BENGAL) 22 C. 286.

(9) *S.* 186—*Nazir's Power of delegation—Civ. Pro. Code (Act* XIV of 1882), s. 251—*Court Fees Act* (*VII of* 1870), s. 22—*Service of Warrant of Attachment.*—The petitioner was convicted under s. 186 of the Penal Code of obstructing a Civil Court peon, who was attaching his property in execution of a decree; the warrant of attachment was addressed to the Nazir of the Court, who delegated its execution to a peon by an endorsement of the peon's name: *Held*, the Nazir had authority thus to delegate the execution of the warrant to the peon. The words "to be executed" in s. 251 of the Code of Civil Procedure would seem to imply that it was not intended that the "proper officer" should himself execute all warrants sent to him. And there is nothing in the Code which indicates in any way that warrants, being either warrants of arrest or of attachment, or for distress and sale, are to be executed by the "proper officer" in any manner different from the service of summonses. The Court Fees Act (VII of 1870) distinctly contemplates

Penal Code Act XLV of 1860)—(*Continued*). PAGE

that the peons are to be employed, not only for the service of summonses, notices or orders, but also for the execution of other processes, such as warrants ofarrest or of attachment and distress. Though the authority may well be conferred in more clear and explicit terms than are expressed by a mere endorsement by the Nazir of the peon's name, still it is impossible to say that that is not sufficient evidence of the delegation. DHARAM CHAND LALL v. QUEEN-EMPRESS, 22 C. 596. ... 397

(10) S. 193—See SANCTION FOR PROSECUTION, 22 C. 176, 586.

(11) S. 199—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

(12) S. 201—*Causing disappearance of evidence of supposed murder—Want of proof of commission of offence.*—Section 201 of the Penal Code applies merely to the person who screens the principal or actual offender and not the principal or actual offender himself. The accused were charged with murder, and also with causing the disappearance of the corpse of the deceased with the intention of screening the murderer from punishment under s. 201 of the Penal Code. Evidence for the prosecution pointed conclusively to one or other of them being the actual murderer; but it was impossible upon the evidence to say which of them caused the death. They were acquitted on the charge of murder, but convicted on the charge under s. 201. *Held*, that the conviction could not stand. TORAB ALI v. QUEEN-EMPRESS, 22 C. 638 ... 425

(13) S. 211—See SANCTION FOR PROSECUTION, 22 C. 586.

(14) S. 304—See RIOTING, 22 C. 276.

(15) S. 363—As drafted in 1837—See THEFT, 22 C. 669.

(16) Ss. 365, 366—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 1006.

(17) Ss. 372, 373—*Buying minor for purpose of prostitution—Intention, Proof of—Onus of proving guilty intention in case of sale of minor for purpose of prostitution—Confession after retraction, Value of—Confession made by person charged jointly with another for separate offences arising out of one transaction, Admissibility of as against the other—Evidence Act (*I *of* 1872*)*, ss. 30, 106.—In order to constitute an offence under s. 373 of the Penal Code, it is not necessary that the intention or knowledge of likelihood as to the employment of the minor for purposes of prostitution should be with reference to employment either immediate or at some definite, and not very remote future period, but an offence under the section is complete as soon as a girl is purchased with the guilty intention or knowledge of likelihood that she shall while still a minor under the age of 16 years, be employed for that purpose, although the point of time for such employment may be remote by reason of her physical incapacity for the purpose. *H*, the father of two girls, twins about a year old, sold one of them to *K*, a prostitute, for Rs. 9, and within ten days of such sale also sold her the other for Rs. 14. *K* was shown to have previously purchased another child whom she had brought up from her infancy, and who was then living with her and leading the life of a prostitute. Both *H*, and *K* made confessions as to the guilty knowledge and intention with which the sale of the two children was made. *K's* confession was made within two hours after her arrest, and immediately thereafter

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she was committed to *hajat* for seven days. On the seventh day, on being brought up for trial before the Deputy Magistrate, she retracted her confession and assigned an innocent reason for her purchase of the girl. *H* and *K* were tried jointly, *H* being charged with an offence under s. 372, *viz.*, selling the girls for the purpose of prostitution, and *K* with an offence under s. 373, *viz.*, buying for the same purpose. Neither was charged with abetting the other. The two confessions were used as evidence, and there was other evidence tending to prove the intention and guilty knowledge. The Deputy Magistrate convicted each of the offence with which they were charged. On appeal the Sessions Judge acquitted *K* on the ground that the offence under s. 373 could not be committed unless the intention was that the minor was to be used for the purpose of prostitution at some definite future time, and that it would be carrying the law too far to hold that the intention had reference to a period some 12 or 14 years after the purchase when the minor became capable of being used for that purpose. *Held*, for the reasons above stated, that the acquittal on that ground was erroneous. *Held*, further, that having regard to the circumstances under which the confession of *K* was given and retracted, it was open to suspicion, and could not safely be acted upon, and that the confession made by H was not legally admissible against her as they were not being tried jointly for the same offence. *Held*, also, that having regard to the provisions of s. 106, illustration (*a*) of the Evidence Act, and to the fact that there was evidence, apart from the confessions, which tended to show the knowledge and intention which the character and circumstances of the act suggested, the onus lay on *K* to show that the intention was other than that which the act suggested, or that the employment of the girls as prostitutes was not intended till after they had attained the age of 16 years, and that as she had failed to show this, and the evidence all tended the other way, the acquittal was erroneous and must be reversed. DEPUTY LEGAL REMEMBRANCER v. KARUNA BAISTOBI, 22 C. 164 ... 110

(18) S. 376—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 1006.

(19) S. 378—See ACT I OF 1871 (CATTLE TRESPASS), 22 C. 139.

(20) S. 379—See THEFT, 22 C. 669.

(21) S. 408—See CRIMINAL BREACH OF TRUST, 22 C. 313.

(22) S. 417—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

(23) S. 429 "*Bull*" *and* "*Cow,*" *Definitions of*—"*Any other animals*" *Meaning of.*—The words "bull" and "cow," in s. 429 of the Penal Code, include the young of those animals. The section specifies the more valuable of the domestic animals, without any regard to age, but in respect of other kinds of animals not so specified the section would not apply unless the particular animal in question was shown to be of the value of fifty rupees or upwards. HARI MANDLE v. JAFAR, 22 C. 457 ... 305

(24) S. 441—See CRIMINAL TRESPASS, 22 C. 123, 391, 994.

(25) Ss. 442, 448—See CRIMINAL TRESPASS, 22 C. 123.

(26) S. 456—See CRIMINAL TRESPASS, 22 C. 391, 994.

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(27) S. 457—See CRIMINAL TRESPASS, 22 C. 391.

(28) Ss. 463, 464, 467—See CRIMINAL BREACH OF TRUST, 22 C. 313.

(29) S. 471—See CRIMINAL BREACH OF TRUST, 22 C. 313.

(30) Ss. 471, 193—See SANCTION FOR PROSECUTION, 22 C. 176.

(31) Ss. 499, 500—See DEFAMATION, 22 C. 46.

(32) S. 509—See CRIMINAL TRESPASS, 22 C. 391, 994.

(33) S. 511—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

Penalty.

(1) See CONTRACT ACT (IX OF 1872), 22 C. 658.

(2) See INTEREST, 22 C. 143.

Personal Actions.

Jurisdiction of Foreign State in—See FOREIGN COURT, 22 C. 222.

Persons jointly interested in Suit.

See MISJOINDER, 22 C. 833.

Petition.

For amendment of order of Privy Council—See APPEAL TO PRIVY COUNCIL, 22 C. 1011.

Plaint.

(1) Amendment of—See IMMOVEABLE PROPERTY, 22 C. 752.

(2) See MISJOINDER, 22 C. 838.

(3) See RES JUDICATA, 22 C. 692.

Pleadings.

(1) Documents referred to in—See INSPECTION, 22 C. 105.

(2) *Object of pleadings—Issue not in terms fixed, but afterwards raised—Appointment of the religious superior of a Mahomedan institution—Custom as to such appointment—Undue influence how indicated.*—The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued in order that each may bring forward evidence appropriate to the issues. The claim here made was that the last preceding *sajjadanashin*, acting according to the custom of the institution of which he was the religious superior and manager, had appointed the plaintiff to succeed him on his decease. The finding of the first Court that he had this power by the custom was affirmed on this appeal. As to the fact of the appointment, it was not apparent at what stage of the suit the question had first been raised whether the deceased had been of sound and disposing mind at the time of making it. The first Court found that he had been of sound mind at the time; but the Chief Court on appeal reversed this finding and added that he had been, in their opinion, unduly influenced. As these questions, though not formally stated in the issues, had been sufficiently open upon the proceeding to give to each Court a right to form a judgment upom them, the Judicial Committee decided which was correct; and affirmed the finding of the first Court as to the unsoundness of mind of the deceased. Upon the question of undue influence, which was an issue different from that of the mental capacity of the deceased in

Pleadings—(*Concluded*). PAGE

appointing, their Lordships found no evidence of either coercion or fraud, under which such influence must range itself, citing 6 H.L. C. 1. They found no evidence of the exercise of any influence. The decision of the Chief Court was, therefore, reversed; and the decree of the first Court, in favour of the plaintiff, was maintained. SAYAD MUHAMMAD v. FUTTEH MUHAMMAD, 22 C. 324 (P.C.) = 22 I. A. 4 = 6 Sar. P.C.J. 515 ... 219

Pledge.

Of moveable property, suit on—See LIMITATION ACT (XV OF 1877), 22 C. 21.

Possession.

(1) Delivery of, under deed of sale unregistered where registration is optional — See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 179.

(2) For long time at unvaried rent—See EVIDENCE, 22 C. 533.

(3) Giving right of suit, Nature of—See SPECIFIC RELIEF ACT (I OF 1877), 22 C. 562.

(4) Inquiry as to—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 22 C. 297.

(5) Of property the subject of criminal trespass—See CRIMINAL TRESPASS, 22 C. 123.

Poundage Fee.

Application to receive—See LIMITATION ACT (XV OF 1877), 22 C. 827.

Power-of-attorney.

(1) Executed in Glasgow—See PRACTICE, 22 C. 491.

Practice.

(1) *Admiralty jurisdiction—Application for consolidation of salvage claims —Civ. Pro. Code (Act XIV of 1882)—Rules and Regulations under 2 and 3, Will IV. C.51.*—On an application by the impuguant for the consolidation of three separate salvage claims made by three different promovents for salvage services rendered by them: *Held* (following the more recent English practice) that the claims should not be consolidated against the will of the promovents, but should be heard one after the other successively, subject however to one set only of costs being allowed to them in the event of the Court finding at the hearing that the application for consolidation was resisted without sufficient grounds. In such a case (as there is no procedure for such an application prescribed by the Rules and Regulations made in pursuance of 2 and 3 Will, IV., c. 51 nor any procedure for consolidation in the Civ. Pro. Code) the practice of the Court of Admiralty in England ought to be followed so far as such practice can be applied to this country by analogy. *In the matter of* THE BRITISH SAILING SHIP "FALLS OF ETTRICK." THE "CHUSAN" v. "FALLS OF ETTRICK," 22 C. 511 ... 341

(2) *Application for letters of administration by constituted attorney—Power-of-attorney executed in Glasgow—Verification—Declaration.*—The Chief Magistrate of the City of Glasgow being a person lawfully authorized to administer oaths, a declaration as to the execution of power-of-attorney taken before him and authenticated by his

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certificate and the common seal of the City of Glasgow and by a notarial certificate is sufficient proof of the execution of the power. *In the goods of* HENDERSON, 22 C. 491 ... 328

(3) *Documents, inspection and discovery of—Minor—Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 129, 136.—An infant party to a suit cannot be compelled under s. 129 of the Code of Civil Procedure to give discovery by affidavit and inspection of documents in his possession relating to the suit. To adopt the practice lately introduced in England would be objectionable mainly on three grounds: (1) because it is not contemplated by the Code of Civil Procedure; (2) because it is inconsistent with existing rules of practice; (3) because there is no method of enforcing an order for discovery against an infant. DUNCAN v. BHOYRO PROSAD, 22 C. 891 ... 590

(4) *Issue of summons—Summons transmitted to local Court for service—Transmitting Court to consider sufficiency or non-sufficiency of service of summons—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 85.—When a summons is issued by one Court to persons resident outside its jurisdiction, and is sent to another Court for service to be effected, it is for the Court from which the summons originally issued to determine whether the service of summons by the Court to which it has been sent for service is sufficient or not. ROMANATH BURAL v. GUGGODONANDAN SEN, 22 C. 889 ... 589

(5) *Mortgage—Suit on mortgage for an account and for sale of mortgaged property—Form of decree—Decree where puisne mortgagee is a party defendant and asks for an account on the footing of his mortgage—Application to vary decree.*—In a suit on mortgage for an account and for sale of the mortgaged property, where a puisne mortgagee who is made a defendant appears and proves his mortgage and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage and for payment of the amount found due to him out of the sale proceeds, the practice of the Court is, where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgage, to make a decree directing an account on the footing of each of the mortgages, and, fixing one period of redemption for all the defendants. An application made by the purchaser of the equity of redemption, who had been made a defendant in such a suit, and had been served with a summons but had failed to appear, that the decree, which had been made in accordance with the above practice, should be varied by limiting it to a decree in favour of the plaintiff alone on the ground that the Court had no jurisdiction in such a suit to make a decree between co-defendants, was dismissed. KISSORY MOHUN BOY v. KALLY CHURN GHOSE, 22 C. 100 ... 69

(6) Pending proceedings, power of High Court to interfere in—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131

(7) *Suit instituted on behalf of minor by next friend—Application for execution of decree by plaintiff on attaining majority and after death of next friend without complying with requirements of s. 451, Civ. Pro. Code.*—Unless there is an absolute bar created by positive enactment a person who has attained his full age is *prima facie* entitled to proceed with a suit instituted on his behalf during his minority, or to make any application therein, and, if necessary, the

Practice—(*Concluded*). PAGE

Court will as a matter of course give him leave to proceed or act in his own name. When a person, on whose behalf a suit had been revived and carried on by his next friend, made, after attaining his majority and long after the death of the next friend, an application in his own name for execution of the decree in the suit without having complied with the requirements of s. 451 of the Civ. Pro. Code as to electing to proceed with the suit and obtaining leave of the Court to do so, and the application was admitted and notice of execution given to the defendant: *Held*, under the circumstances that such omission to comply with the requirements of s. 451, though an irregularity, was not a bar to the application being allowed to proceed. An application under s. 451, for leave to proceed with a suit, does not rsquire any notice, but may be made *ex parte* at any time. Even if the application in this case therefore were not itself a sufficient indication that the applicant elected to proceed with the suit, and that the Court in allowing him to proceed in his own name gave him the required leave (and *semble* that would be the case), the Court could give such leave at the hearing of the application *nunc pro tunc*. The provision of s. 451, which requires the title of a suit to be corrected in such a case applies to a pending suit, and not to a suit after final decree in which it only remains to proceed in execution. DOORGA MOHUN DASS v. TAHIR ALLY. TAHIR ALLY v. KOORSOMBOO, 22 C. 270 ... 181

(8) See DIVORCE, 22 C. 544.

(9) See INSPECTION, 22 C. 105.

(10) See WRITTEN STATEMENT, 22 C. 268.

Prayer.

In plaint for personal decree, and to enforce charge against property pledged—See LIMITATION ACT (XV OF 1877), 22 C. 21.

Presumption.

Arising from long possession—See EVIDENCE, 22 C. 533.

Previous Acquittal.

When no bar to further trial—See ACQUITTAL, 22 C. 377.

Principal Officer.

Of Corporation or Company—See WRITTEN STATEMENT, 22 C. 268.

Privacy.

Intrusion on—See CRIMINAL TRESPASS, 22 C. 994.

Privilege.

Claim of right to put in further affidavit in support of—See INSPECTION, 22 C. 105.

Privity.

See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 480.

Privy Council.

(1) *Execution of decree—Stay of execution—Order staying execution of a decree—Civ. Pro. Code (Act* XIV *of* 1882), s. 608, *sub-section* (c).—The High Court having, under s. 603, sub-section (*a*) of the Civ. Pro. Code, declared the admission of an appeal from their decree, refused an order applied for, under s. 608, sub-section (*e*), for

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staying execution pending the appeal, the two Judges constituting the Court differing as to whether or not the case was such that the application should be granted. Their Lordships decided that the execution of the decree should be stayed pending the appeal. An order of Her Majesty in Council followed to that effect. CHATRAPAT SINGH DURGA *v.* DWARKANATH GHOSE, 22 C. 1 (P.C.)=21 I.A. 170=6 Sar. P.C.J. 514 ... 1

(2) Order of effect of—See APPEAL TO PRIVY COUNCIL, 22 C. 1011.
(3) Practice of—See LIMITATION ACT (XV OF 1877), 22 C. 609.

Probabilities.

See EVIDENCE, 22 C. 519.

Procedure.

See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 483.

Proceedings of Legislature.

See STATUTE, 22 C. 1017.

Property.

(1) Delivery of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 179.
(2) In trees growing on land—See LANDLORD AND TENANT, 22 C. 742.
(3) Of debtor, removal of, by creditor—See THEFT, 22 C. 669, 1017.
(4) Seizure of, on suspicion—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 22 C. 761.
(5) Wrongly taken in execution, suit for—See CIVIL PROCEDURE CODE, (ACT XIV OF 1882), 22 C. 483.

Prosecution.

(1) Commenced more than six months after granting of sanction—See SANCTION FOR PROSECUTION, 22 C. 176.
(2) Under Penal Code, power of Municipal Commissioners to institute—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

Public Function.

See ACT VIII OF 1876 (ESTATES PARTITION, BENGAL), 22 C. 286.

Public Policy.

Contract illegal as opposed to—See EXECUTOR, 22 C. 14.

Public Right of Way.

See JURISDICTION, 22 C. 551.

Public Servant.

(1) Obstruction of—See ACT VIII OF 1876 (ESTATES PARTITION, BENGAL) 22 C. 286.
(2) See PENAL CODE (ACT XLV OF 1860), 22 C. 759.

Purchaser.

(1) Application by, to set aside sale—See SALE, 22 C. 565.
(2) *Bona fide* without notice—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.
(3) From judgment-debtor prior to attachment, application to set aside sale by—See SALE, 22 C. 802.
(4) Right of—See HINDU LAW (WIDOW), 22 C. 974.
(5) See SALE, 22 C. 909.

Question of Fact. PAGE

(1) Relating to execution of decree—See RIGHT OF SUIT, 22 C. 501.

(2) Wheher land is Mal or Lakhiraj—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 244.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 179.

Quo Warrants.

Proceeding in nature of—See MUNICIPAL ELECTION, 22 C. 717.

Receiver.

(1) Appointment of—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 22 C. 459.

(2) *Attorney, Improper conduct of—Agreements entered into with one party to a suit—Contempt of Court.*—A Receiver appointed by the Court entered into two private agreements, one prior to, the other subsequent to, the date of his appointment, with one of the defendants in the suit, restricting and controlling his powers. Neither agreement was at any time brought to the notice of the Court: *Held*, this was a gross contempt of Court, for which the parties were liable to committal. A Receiver is a servant of the Court, and has only such power and authority as the Court may choose to give him. MANICK LALL SEAL *v.* SURRUT COOMAREE DASEE, 22 C. 648 ... 431

(3) Liability of, to account—See APPEAL (TO PRIVY COUNCIL), 22 C. 1011.

(4) Lien of, on estate—See APPEAL (TO PRIVY COUNCIL), 22 C. 960.

(5) Order refusing to appoint—See APPEAL (TO PRIVY COUNCIL), 22 C. 928.

Recorder of Rangoon.

Case in which appeal lies from, to Privy Council—See SANCTION FOR PROSECUTION, 22 C. 487.

Record of Rights.

(1) Dispute prior to preparation of—See APPEAL (SECOND APPEAL), 22 C. 477.

(2) Suit for amendment of—See REGULATION III OF 1872 (SONTHAL PERGUNNAHS SETTLEMENT), 22 C. 473.

Register.

Prepared by Special Commissioner, effect to be given to—See ACT I OF 1879 (CHOTA NAGPORE LANDLORD AND TENANT PROCEDURE), 22 C. 112.

Registration.

(1) Of deed of sale—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 179.

(2) Of name before recovering rent—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 634.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Regulation VIII of 1793.

(1) Ss. 31 and 76—See ENHANCEMENT, 22 C. 214.

(2) Ss. 54, 55—See CHOWKIDARI TAX, 22 C. 680.

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S. 3—See CHOWKIDARI TAX, 22 C. 680.

Regulation XXIX of 1814.

S. 2—See GHATWALI TENURE, 22 C. 156.

Regulation III of 1872 (Sonthal Pergunnahs Settlement).

Ss. 11, 25—"*Proprietor*," *Meaning of—Suit for establishment of* lakhiraj *title and amendment of record of rights—Jurisdiction of Civil Court*—Onus probandi.—In proceedings for settlement of rent and record of rights under the Sonthal Pergunnahs Settlement Reg. (III of 1872), certain lands claimed by the plaintiffs as *lakhiraj* were ordered to be recorded as *mal* and assessed with rent, the Commissioner of the Division stating that the plaintiffs might, if they chose, bring a suit in the Civil Court. The defendant (zemindar) obtained an *ex-parte* decree for rent on the basis of the *jummabandi* prepared in the said proceedings. In a suit brought to establish the plaintiffs' *lakhiraj* title and for an order directing the record of rights and *jummabandi* to be amended. *Held*, that a *lakhirajdar* is a "proprietor" within the meaning of s. 25 of the Regulation, and ss. 11 and 25 did not bar the jurisdiction of the Civil Court in this case. *Held*, also, that in the present case the *onus* was on the plaintiffs to prove their alleged *lakhiraj* title. RAMRANJAN CHUCKERBUTTY v. NANDA LAL LAIK, 22 C. 473 ... 316

Remand.

See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 22 C. 419.

Re-marriage.

See HINDU LAW (WIDOW), 22 C. 589.

Remuneration.

Paid to executor for performance of his duties—See EXECUTOR, 22 C. 14.

Rent.

(1) Arrears of, suit by Joint-Proprietor for—See CONTRACT ACT, (IX OF 1872), 22 C. 658.

(2) As first charge on tenure—See ACT VIII OF 1885 (BENGAL, TENANCY), 22 C. 364.

(3) Covenant for, at higher rate—See CONTRACT ACT (IX OF 1872), 22 C. 658.

(4) Liability of lessee for, after transfer—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 494.

(5) Suit for, decree for use and occupation in—See IMMOVEABLE PROPERTY, 22 C. 752.

(6) Suit for, obligation to register name before bringing—See ACT VII OF 1876 (LAND REGISTRATION), 22 C. 454.

(7) Suit for, of land to which the plaintiff succeeded before Tenancy Act came into force—See ACT VII OF 1885 (TENANCY, BENGAL), 22 C. 337.

(8) See CHOWKIDARI TAX, 22 C. 680.

Representative.

(1) Of debtor, execution against—See EXECUTION OF DECREE, 22 C. 558.

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(2) *Of deceased person—Representative of insolvent debtor—Civ. Pro. Code, 1882, s. 252—Suit against widow of insolvent as his legal representative—Parties—Official Assignee—Form of decree.*—The husband of the defendant was adjudicated an insolvent in 1891, and the usual order was made vesting his estate in the Official Assignee. He subsequently died without having filed his schedule and no schedule had ever been filed. After his death a suit was brought by a creditor against the defendant as the "widow, heiress, and legal representative" of the deceased insolvent, in which suit a decree was made against her, "the amount to be levied out of the assets of the deceased to her hands." In an application by the defendant to have the decree set aside on the grounds that the Official Assignee was a necessary party to the suit, and that the decree should have been against him as her husband's representative, as his estate was in his lifetime, and since had continued to be, vested in the Official Assignee. *Held* that, the death of the insolvent his widow, the defendant, became his legal representative within the meaning of s. 252 of the Civ. Pro. Code, and that the existence of the vesting order in no way affected her position as such representative. *Held*, also, that the Official Assignee was not a necessary party to the suit. The Official Assignee is not a necessary party to any suit to recover a money debt from a person who is either an insolvent at the time the suit is instituted or becomes insolvent pending the suit. But a decree made against an insolvent under such circumstances should be restricted in form so as not to allow the judgment-creditor by means of execution to obtain an advantage over the general body of creditors. In this case the decree was varied by the omission of the words "to be levied out of the assets of the deceased in her hands," and liberty was reserved to the judgment-creditor to prove for the amount of his decree in the insolvent Court, with a note that execution of the decree is stayed pending the insolvency. CHANDMULL v. RANEE SOONDERY DOSSEE, 22 C. 259 ... 174

Requisition.

On tenant to pay compensation, omission from notice of—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 77.

Res Judicata.

(1) *Partnership—Suits by different partners for specific sums of money on adjustment of accounts adjusted by Amin appointed in previous suits—Civ. Pro. Code, s. 13, expl* ii *and* iii, *and s. 43—Plaint, Amendment of under s. 53, Civ. Pro. Code—Court Fees Act* (VII *of* 1870), *s.* 7, *para.* iv, *cl.* (*f*)—*Suits Valuation Act* (VII *of* 1887), s. 8.—After dissolution of a certain partnership, two separate suits were brought in 1889 by different partners for specific sums of money due to them, and, in the alternative, for such other amount as might be found due on an adjustment of accounts. Objections were raised against these suits on the grounds *inter alia*, (1) that the suits were barred by the provisions of s. 265 of the Indian Contract Act; (2) that separate suits for the same matter were not maintainable; (3) that the suits would not lie in the Munsif's Court; and (4) that accounts having been already adjusted there was no cause of action. The Munsif overruled

Res Judicata—(*Continued*). PAGE

the first three objections, and held, as regards the fourth, that the adjustment pleaded had been ratified by the plaintiffs; he appointed an Amin, who examined the accounts and ascertained the respective claims of the partners, and the plaintiffs in those suits obtained decrees on the basis of the Amin's adjustment of account. The present suits were brought in 1891 by certain other partners, who were defendants in the suits of 1889, on the allegation that the partnership account had been already adjusted by the Amin appointed in the suits of 1889 and the debts and dues of all parties had been determined by the Court. The plaintiffs prayed for recovery of the amount due to them under the Amin's adjustment, and, in the alternative, for such other relief as might be deemed proper by the Court, to grant them against any of the defendants. *Held* by NORRIS and BANERJEE, JJ. (RAMPINI, J., dissenting), (*a*) That neither s. 13 nor s. 43 of the Civ. Pro. Code was a bar to the present suits. (*b*) That under the provisions of s. 7, para. iv, cl. (*f*) of the Court Fees Act (VII of 1870), and s. 8 of the Suits Valuation Act (VII of 1887), the suits were properly brought in the Munsif's Court; (*c*) That the suits were correctly framed, and that such defects as there were in the plaint, *viz.*, an incorrect statement as to the dues of all the partners, having been determined in the former suit, and the omission of an alternative prayer for an account, were no bar to the maintenance of the present actions. (*d*) That an amendment of the plaint under s. 53 of the Code of Civil Procedure should be allowed: *Held* by RAMPINI, J. That there was ground for contending that, under expl. ii and iii to s. 13 of the Civ. Pro. Code, the present suits were barred; and that the amendments proposed to be made in the plaint could not be allowed under s. 53 of the Code of Civil Procedure. DHANI RAM SHAHA v. BHAGIRATH SHAHA, 22 C. 692 ... 460

(2) See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 244.

(3) See DIVORCE, 22 C. 544.

Resumption.

Of tenure by Zemindar—See SERVICE TENURE, 22 C. 938.

Re-trial.

Effect of order directing—See ACQUITTAL, 22 C. 377.

Revenue Commissioner.

Order of, setting aside sale—See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 22 C. 419.

Revenue Officer.

Power of—See ACT VIII OF 1885 (TENANCY, BENGAL), 22 C. 244.

Reversal of Decree.

On appeal—See RIGHT OF SUIT, 22 C. 501.

Review.

(1) Of judgment order granting—See APPEAL, 22 C. 3, 734, 984.

(2) Of order setting aside Sale—See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 22 C. 419.

Revision. PAGE

(1) *Crim. Pro. Code* (*Act* X *of* 1882), s. 439—*Power of Court on revision —Revision on facts.*—The interference of the High Court in revision is not limited to matters of law ; it is fully competent to the High Court to enter into matters of fact if its thinks fit. But the mere application of a party to examine the evidence in any case would not be a sufficient ground for doing so. There must appear on the face of the judgment or order complained of, or of the record some ground to induce the High Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. But no hard and fast rule can be laid down ; each case will have to be dealt with according to its own circumstances. KESHAB CHUNDER ROY v. AKHIL METEY, 22 C. 998 ... 663

(2) Power of High Court in—See ACT III OF 1884 (BENGAL MUNICIPAL), 22 C. 131.

(3) See CRIMINAL TRESPASS, 22 C. 391.

Revivor.

See LIMITATION ACT (XV OF 1877), 22 C. 921.

Right of Suit.

(1) Nature of possession giving—See SPECIFIC RELIEF ACT (I OF 1877), 22 C. 562.

(2) *Question relating to execution, &c., of decree—Decree for costs—Sale of immoveable property in execution—Reversal of decree on appeal—Suit for recovery of mesne profits—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 244, 583.—*A* brought a suit against *B* for compensation but it was struck off, and *B* obtained a decree for costs. *A* appealed, but pending the appeal *B* executed his decree, and in execution thereof, purchased certain immoveable property of *A*, and took delivery of possession. The appellate Court remanded the case for retrial on the merits and a decree was passed by the Court of first instance in *A*'s favour, which was confirmed on appeal, and he got back his property. *A* then brought a suit for the value of crops wrongfully appropriated by *B* during the period he was in possession. It was contended on second appeal that such a suit was barred by the provisions of s. 244 of the Civ. Pro. Code. *Held*, that the question to be decided in this suit did not relate to the execution, discharge, or satisfaction of the original decree within the meaning of s. 244, because it did not arise at all until that decree had ceased to exist, and such a suit was not barred by the provisions of that section. COFFIN v. KARBARI RAWAT, 22 C. 501 ... 334

(3) *Suit against the Collector as Agent for the Court of Wards—Disqualified owner—Act* XXXV *of* 1858 (*Care of the Estates of Lunatics*), *s.*11—*Act* XVII *of* 1876 (*Oudh Land Revenue*), *ss.* 175 *and* 176—*Civ. Pro. Code*, *ss.* 440, 464.—A decree was made against a Deputy Commissioner as Agent for the Court of Wards for a debt due from a proprietor, whose estate had come under the charge of that officer in virtue of an order made by the District Court under Act XXXV of 1858, the debtor having been found to be of unsound mind and incapable of managing his affairs. The Judicial Commissioner having called for the record under s. 622 of the Civ. Pro. Code, set aside the decree, which had been affirmed on appeal. He was of opinion that the suit should not have been brought against the Deputy

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Commissioner in the above character, but would only lie against a manager appointed as Act XXXV of 1858 directed, or else against a guardian. This judgment having gone upon a technicality, not well founded, was reversed, and the original decree was restored. ASHARFI LAL v. DEPUTY COMMISSIONER OF BARA BANKI, 22 C. 729 (P.C.) = 22 I.A. 90 = 6 Sar P.C.J. 590 = 5 M.L.J. 77 ... 484

(4) Without certificate—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 22 C. 143.

(5) See ACT VIII OF 1885 (TENANCY BENGAL), 22 C. 480.

(6) See CIV. PRO. CODE (ACT XIV 1882), 22 C. 483.

(7) See JURISDICTION, 22 C. 551.

Right of Way.

Obstruction to—See JURISDICTION, 22 C. 551.

Rights.

As between Administrator-General and Executors transferring estate to him.—See APPEAL (TO PRIVY COUNCIL), 22 C. 1011.

Right to sue.

Survival of—See ABATEMENT, 22 C. 92.

Rioting.

Rioting armed with a deadly weapon—Common object of unlawful assembly, Statement of, in charge—Penal Code, ss. 147, 148, 149 and 304—Error in charge misleading accused—Crim. Pro. Code (1882), s. 225.—Before a conviction can properly be maintained for the offence of rioting, it is necessary that there should be a clear finding as to the common object of the unlawful assembly, and also that the common object so found should have been stated in the charge in order that the accused person might have an opportunity of meeting it. Where a Sessions Judge in his charge to the jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge sheet: *Held*, that inasmuch as it was impossible to say which of the two common objects had been accepted by the jury, and it might well have been that they had accepted the one which had not been charged, and which consequently the accused had not had an opportunity of meeting, the conviction must be set aside. If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under s. 148 of the Penal Code. It is only the actual person so armed who can be charged under that section. SABIR v. QUEEN-EMPRESS, 22 C. 276. 185

River.

Right of Fishery in—See FISHERY, 22 C. 252.

Rules.

(1) And Regulations under Statute 2 and 3, Will. IV, c. 51—See PRACTICE, 22 C. 511.

(2) Of Local Government—See MUNICIPAL ELECTION, 25 C. 717.

Sajjadanashin.

Appointment of—See PLEADINGS, 22 C. 324.

Sale. PAGE

(1) For arrears of rent—See ACT VIII OF 1885 (TENANCY BENGAL), 22 C. 364.

(2) *For arrears of rent—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 311 *and* 312 *—Application to set aside a sale of a tenure by a purchaser from the judgment-debtor prior to attachment—Second appeal—Order setting aside sale—Civ. Pro. Code, s.* 622.—A person who claims to be a purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent, is entitled to apply under s. 311 of the Code of Civil Procedure to set aside the sale. No second appeal lies against an order under s. 312 of the Code setting aside a sale, and the Court refused under the circumstances to interfere under s. 662. AUBHOYA DASSI v. PUDMO LUCHUN MONDOL, 22 C. 802... 531

(3) For arrears of rent, money paid to save property from—See VOLUNTARY PAYMENT, 22 C. 28.

(4) For arrears of rent—Payment to set aside—See CO-SHARERS, 22 C. 800.

(5) For arrears of revenue—See ACT VIII OF 1885 (TENANCY BENGAL), 22 C. 244.

(6) *For arrears of revenue Sale of share of Hindu widow—Act* XI *of* 1859, *s.* 54*—Sale of a share in an estate for arrears of revenue, Effect of on reversionary interest.*—Where a share of an estate held by a Hindu widow was sold for arrears of revenue, it was contended that, under s. 54 of Act XI of 1859 the estate acquired by the purchaser lasted only during the lifetime of the widow: *Held*, that the purchaser did not take any interest limited to the life of the widow, but the entire share passed by the sale. DEBI DAS CHOWDHRI v. BIPRO CHARAN GHOSAL, 22 C. 641 ... 427

(7) *For arrears of revenue--Suit to set aside—Act* XI *of* 1859, *s.* 5*—Attachment by order of Civil Court—Latest day of payment—Attachment subsequent to.*—In a suit to set aside the sale of an estate for arrears of revenue, one of the grounds taken by the plaintiff, was that the estate, which was under attachment by an order of the Civil Court at the time of the sale, was sold without due observance of the formalities prescribed by s. 5, Act XI of 1859. The date fixed for payment of the arrears for which the estate was sold was 7th June 1890. The date of attachmeut was 2nd August following. *Held*, that s. 5 of Act XI of 1859 provides for cases in which the attachment has been made at least fifteen days before the last date of payment for which it is sought to bring the estate to sale. That section would not, therefore, apply to a case like the present in which the attachment was after the last day of payment and after the estate had become liable to sale for arrears of Government revenue. NOWNIT LAL v. BADHA KRISTO BUTTACHARJEE, 22 C. 738 ... 490

(8) In execution of decree.—See HINDU LAW (WIDOW), 22 C. 974.

(9) *In execution of decree—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 313 *— Application by auction-purchaser to set aside a sale on the ground that the judgment-debtors had no saleable interest in the property—Effect of an adoption by a co-widow after the estate has been vested in the other widow.*—A Hindu governed by the Mitakshara law, died, leaving him surviving two widows, *G* and *B*, and

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a son, *S*, by *G*. By a will he authorized his widow, *B*, to adopt a son, in the event of *S* dying unmarried; but he made no disposition of his property, which was left to devolve according to Hindu law. *S* died unmarried in the year 1290 (1883), and B adopted a son in the same year, to which adoption *G* was not a party. In the year 1296 (1889), in order to liquidate debts of their husband the widows executed a mortgage bond in favour of one *F*, who obtained a decree in 1299 (1892). In execution of that decree the mortgaged properties were sold and purchased by a third party. On an application made by the auction-purchaser to set aside the sale, on the ground that the judgment-debtors had no saleable interest in the property, as it had upon the adoption, vested in the adopted son. *Held*, that as an adopted son is not entitled to claim as preferential heir the estate of any other person, besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopted him, the adoption by *B* could not have the effect of divesting *G* of the estate which had devolved upon her as heir of her son, and if that was so, it could not be said that the judgment-debtors had no saleable interest in the property, and therefore the sale could not be set aside. *Held*, also, that *G* was not under any such religious obligation to give her assent to the adoption by *B* as should have the effect of divesting her of the estate. FAIZUDDIN ALI KHAN v. TINCOWRI SAHA, 22 C. 565 ... 377

(10) In execution of decree for sale—See JURISDICTION, 22 C. 871.

(11) In execution of decree, held after Act V of 1894—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 767.

(12) In execution of decree of immoveable property—See RIGHT OF SUIT, 22 C. 501.

(13) *In execution of decree—Rights of purchasers—Mortgage decree—Purchases in execution by decree-holders—Title of purchaser holding a decree on a mortgagee which had preceded his opponent's decree—No notice to mortgagee that mortgagor was only benami-holder for the judgment-debtor—Estoppel—Attachment.*—The plaintiffs and defendants, either party holding a separate decree against the same estate, had by leave purchased in execution. Both parties claimed the proprietary right and possession, the defendants holding the latter. The first of the decrees in date was the plaintiffs' for money against the representatives of the deceased owner of the property, which before then had been mortgaged to the defendants by his widow. The plaintiffs obtained only the equity of redemption, their purchase having been of the right, title, and interest. The mortgagees, having got a decree upon their mortgage against the widow, purchased at the sale in execution, and defended the possession which they obtained. *Held*, that the defendants, in whose favour the decree had been made upon a *bona-fide* mortgage, without notice that the mortgagor had been only holding *benami* for her husband, had the better title; that the High Court had rightly disallowed an objection taken by the plaintiffs, that this defence, as distinguished from the defendants' answer that the widow was the real owner had not been set up or decided in the Court of first instance; and *held*, that the owner, having in his lifetime authorized his wife to hold herself out as proprietor in her own right, could not have succeeded

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in a suit to disentitle the mortgagees without proving that they either had taken the mortgage with such notice, or that they had been put upon enquiry ; that the same principle applied to these plaintiffs, who had purchased his right, title and interest ; and that they were bound equally with him. I.A Sup. Vol. 40 ; 11 B.L.R., 46, referred to and followed, as to the application of estoppel. An attachment, which had, at one time, prohibited alienation of the property, and on which the plaintiffs relied as having rendered the mortgage invalid, was shown to have been no longer in operation at the time when the mortgage was executed. MAHOMED MOZUFFER HOSSEIN v. KISHORI MOHUN ROY, 22 C. 909 (**P.C.**) = 22 I.A. 129 = 5 M.L.J. 101 = 6 Sar. P.C.J. 583 ... 602

(14) In execution of mortgage decree—See ACT VIII OF 1885 (TENANCY BENGAL, 22 C. 364.

(15) Of mortgaged property—See MORTGAGE SALE, 22 C. 33.

Saleable Interest.

In property sold—See SALE, 22 C. 565.

Salvage Claims.

Consolidation of—See PRACTICE, 22 C. 511.

Sanction for Prosecution.

(1) *Crim. Pro. Code, (Act X of 1882), s. 195—Subordinate Court, What is a—Jurisdiction of the High Court to revoke or grant sanction in cases in which appeal lies to "Her Majesty in Council" from the Court of the Recorder of Rangoon.*—In matters relating to the grant of sanction to prosecute under s. 195 of the Crim. Pro. Code (Act X of 1882), a Court is regarded as "subordinate" to another Court where the latter is the Court to which appeals from the former ordinarily lie, *i.e.*, lie in the majority of cases. Though the decree in the present instance was appealable to "Her Majesty in Council", still, as appeals from the Court of the Recorder of Rangoon ordinarily lay to the High Court, the former was held to be Subordinate to the latter Court within the meaning of the section. MADURAY PILLAY v. ELDERTON, 22 C. 487. ... 325

(2) *Crim. Pro. Code (Act X of 1882), ss. 195, 437 and 438—Power of the Sessions Judge to interfere with orders passed by the District Magistrate—Fresh sanction, Grant of after expiry of six months from the date of the first sanction.*—Both the Sessions Judge and the District Magistrate are competent, under s. 437 of the Crim. Pro. Code, to order a further enquiry ; but the Sessions Judge has no jurisdiction to review an order made by the District Magistrate under that section refusing a further enquiry. It is open to the Sessions Judge to refer the matter to the High Court under s. 438. If six months expire after the grant of sanction under s. 195 of the Crim. Pro. Code, and no prosecution is commenced under it within that time, it is not open to the prosecutor to procure a fresh sanction and to institute proceedings upon such fresh sanction. The words "six months from the date on which the sanction was given" must be taken to mean six months from the date on which it was given in the first instance, and not from any subsequent date on which the purport of the order might have been

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repeated. The Munsif, who tried the suit out of which the application for sanction arose, refused to sanction any prosecution ; the Munsif, who originally sanctioned the prosecution, was a different officer ; while the Munsif who gave the fresh sanction was neither the Munsif who tried the case nor the Munsif who sanctioned the prosecution originally. *Semble*—Under these circumstances, it is extremely doubtful whether the sanction was such as is contemplated by s. 195 of the Crim. Pro. Code. DARBARI MANDAR v. JAGOO LAL, 22 C. 573 ... 382

(3) *Crim. Pro. Code* (*Act* X *of* 1882), *ss.* 195 *and* 560—*Penal Code, ss.* 193 *and* 211—*Sanction to prosecute and award of compensation—Imprisonment in default of payment of compensation.*—The complainant was directed to pay Rs. 50 as compensation to the accused, or, in default, to suffer simple imprisonment for one month, under s. 560 of the Code of Criminal Procedure, and sanction was also granted to prosecute him for offences under ss. 211 and 193 of the Penal Code. *Held*, that if the Magistrate thought that this was a case in which a prosecution under ss. 211 and 193 of the Penal Code, should be sanctioned, he ought not to have taken action under the provisions of s. 560 of the Code of Criminal Procedure. *Held*, also, that the order for imprisonment in default of payment of the compensation awarded was illegal. SHIB NATH CHONG v. SARAT CHUNDER SARKAR, 22 C. 586 ... 391

(4) *Prosecution commenced more than six months after granting of sanction, the period intervening being close holidays—Penal Code, ss.* 193, 471 —*Crim. Pro. Code* (1882), *ss.* 195 *and* 537.—Sanction to prosecute R. for offences under ss. 193 and 471 of the Penal Code, committed in the course of a judicial proceeding, was granted on the 5th September 1893, and the prosecution was commenced before the Magistrate on the 7th March 1894, the 4th March being a Sunday, and the 5th and 6th, Court holidays. R. was committed to the Sessions. *Held*, that as s. 7 of Act I of 1887 does not apply to the Code of Criminal Procedure of 1882, and there is no provision of law by which the period provided by s. 195 during which a sanction may remain in force can be extended by reason of the period expiring during Court holidays, the proceedings of the Magistrate were without jurisdiction, and the commitment must be quashed. *Held*, further, that s. 537 of the Code of Criminal Procedure was not intended to override the provisions of s. 195, nor can it be said that there has not been a failure of justice in the prosecution of a person after the period for which the sanction was in force has expired. RAJ CHUNDER MOZUMDAR v. GOUR CHUNDER MOZUMDAR, 22 C. 176 ... 119

Sapindas.

See HINDU LAW, INHERITANCE, 22 C. 339.

Second Cousins.

See HINDU LAW, INHERITANCE, 22 C. 339.

Secrecy.

As evidence of fraud—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Security.

Enforcement of—See SURETY, 22 C. 25.

Seizure. PAGE

Of cattle—See ACT I OF 1871 (CATTLE TRESPASS,) 22 C. 139.

Sentence.

(1) Nature of—See HINDU LAW, MAINTENANCE, 22 C. 291.

(2) See CONVICTION, 22 C. 805.

Separate Property.

See GHATWALI TENURE, 22 C. 159.

Separate Suit.

(1) See EXECUTION OF DECREE, 22 C. 859, 903.

(2) See SURETY, 22 C. 25.

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(1) Of summons, sufficiency of—See PRACTICE, 22 C. 889.

(2) Of warrant of attachment—See PENAL CODE (ACT XLV OF 1860), 22 C. 596.

Service Tenure.

Jagir granted to Gorait *or Village Watchman—Resumption by Zemindar—Notice to quit.*—A service tenure created for the performances of services, private or personal, to the zemindar may be resumed by the zemindar when the services are no longer required or when the grantee of the tenure refuses to perform the services. The distinction between a grant of an estate burdened with a certain service, and an office the performance of whose duties is remunerated by the use of certain lands, pointed out. In a suit for resumption of jagir lands granted by the zemindar to a *gorait* (village watchman), the lower Courts found that the grant was made in favour of the defendant's ancestor more than twelve years before suit, and descended from father to son who was allowed to retain possession without rendering services to the zemindar, and that the zemindar could not prove the terms of the grant. *Held*, that the facts found did not legitimately lead to the inference drawn therefrom that the tenure was of a permanent character ; but that the defendants could not be ejected without notice. RADHA PERSHAD SINGH v. BUDHU DASHAD, 22 C. 938 ... 622

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(1) Power of, to interfere with order of District Magistrate—See SANCTION FOR PROSECUTION, 22 C. 573.

(2) Power of, to try person not committed—See PARDON, 22 C. 50.

(3) Reference in judgment to opinion of Committing Magistrate—See CONVICTION, 22 C. 805.

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(1) In perpetuity—See MAHOMEDAN LAW (WAKF), 22 C. 619.

(2) Post nuptial, with power of appointment to wife—See TRANSFER OF ROPE RTY ACT (IV OF 1882), 22 C. 185.

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Single act constituting several offences.

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Small Cause Court.

Presidency Towns, New Trial, Second application for—Presidency Small Cause Courts Act, XV *of* 1882, *s.*37--*Practice—Civil Procedure Code, Act* XIV *of* 1882, *s.* 622—*Act* IX *of* 1850, *s.* 53.—The Judges of the Calcutta Small Cause Court have power to entertain in the same suit more than one application for a new trial. There is nothing in s. 37 of Act XV of 1882, prohibiting such a practice. It is in accordance with the practice of Courts in England to allow such applications. SURRUT COOMARI DASSEE v. RADHA MOHUN ROY, 22 C. 784 ... 519

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Special Commissioner.

Register prepared by, Effect to be given to—See ACT II OF 1869 (CHOTA NAGPORE TENURES), 22 C. 112.

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Specific Performance.

Suit for specific performance of a contract against a minor—Contract entered into by a guardian with the sanction of the Court—Act XL *of* 1858, *s.* 18—*Guardians and Wards Act* (VIII *of* 1890), *s.* 31.—In a suit to enforce specific performance of a contract against a minor, entered into by a guardian appointed under Act XL of 1858, with the sanction of the Court, it was not shown that the contract was for the benefit of the minor. *Held*, that a decree for specific performance of a contract should not be made against the defendant while an infant. *Held*, also, that although the jurisdiction to decree specific performance is discretionary, it must be judicially exercised, and no Court would, even if it could make a decree for the specific performance of a contract, unless the contract was shown to be for the infant's benefit. JUGUL KISHORI CHOWDHURANI v. ANUNDA LAL CHOWDHURI, 22 C. 545 ... 363

Specific Relief Act (I of 1877).

(1) S. 9—See APPEAL (GENERAL), 22 C. 830.

(2) *S.* 9—*Nature of possession giving right of suit—Juridical possession.*—Where the plaintiff alleged that he was in possession of a certain room, as representing his father and uncle who were alive, but who were not parties to the suit, and that he had been dispossessed from such room within six months of the institution of the present suit: *Held*, that his possession, not being juridical possession, did not entitle him to maintain a suit under s. 9 of the Specific Relief Act. Permission to be allowed to amend the plaint by alleging that the possession of the plaintiff was exclusive possession on his own

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account was not allowed, such allegation being inconsistent with the case on which he came into Court. NRITO LALL MITTER v. RAJENDRO NARAIN DEB, 22 C. 562 ... 374

(3) S. 42—See HINDU LAW (REVERSIONER) 22 C. 354.

(4) S. 45—See MUNICIPAL ELECTION, 22 C. 717.

Stamp Act (I of 1879).

(1) *S.* 3, *cl.* 4 (*b*), *sch.* I, *art.* 1 *&* *s.* 61.—*Offence under—Acknowledgment of debts in writing—Attestation by witnesses—Bonds.*—Documents which are in form acknowledgments only are not converted into bonds as defined in s. 3, cl. 4 (*b*) of the Stamp Act (I of 1879), merely because they contain memoranda as to the rate of interest at which the loan is made and are attested by witnesses. No document can be a bond within the above section, unless it is one which by itself creates an obligation to pay the money. HIRA LAL SIRCAR v. QUEEN-EMPRESS, 22 C. 757 ... 502

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(1) Construction of—See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 22 C. 788.

(2) *Proceedings of Legislature.*—*Per* PIGOT, J.—Proceedings of the Legislature cannot be referred to as legitimate aids to the construction of an Act. QUEEN-EMPRESS v. SRI CHURN CHUNGO, 22 C. 1017 (F.B.) ... 676

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 767.

Statute 13, Eliz., C. 5.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Statute 27, Eliz., C. 4

See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

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See PRACTICE, 22 C. 511.

Stay of Execution.

See PRIVY COUNCIL, 22 C. 1.

Step-in-aid of Execution.

Of Decree—See LIMITATION ACT (XV OF 1877), 22 C. 375, 827 ; 23 C. 196, 437, 690, 817.

Sub-Divisional Magistrate.

Power of, to transfer or withdraw cases—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 898.

Subordinate Court.

See SANCTION TO PROSECUTION, 22 C. 487.

Succession Certificate Act (VII of 1889).

S. 4—*Right to maintain suit, without certificate—Suit on mortgage bond by heir—Suit continued by party substituted for plaintiff who has taken out certificate.*—A mortgage bond was executed by the defendant in favour of *H*, who died leaving two sons, *J* and *S*, th

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elder of whom *J* took out a certificate to collect the debts of his father, and instituted a suit on the bond in which he asked both for sale of the mortgaged property and for a personal decree against the defendants. Whilst the suit was pending *J* died, and *S* was allowed to be substituted in his place as plaintiff. A decree was made for sale of the property, but the personal relief was not granted, as it was held to be barred by lapse of time: *Held*, that this was not "a decree against a debtor for payment of his debt" within the meaning of s. 4 of the Succession Certificate Act (VII of 1889). The suit was therefore maintainable notwithstanding that no certificate had been taken out by *S*. *Semble.*—It is doubtful whether that Act would apply at all to the case of a person who has been substituted as plaintiff for one who, having taken out a certificate, has died pending the suit. BAID NATH DAS v. SHAMANAND DAS, 22 C. 143 ... 97

Suit.

(1) By different partners for specific sums of money on adjustment of accounts—See RES JUDICATA, 22 C. 692.

(2) For arrears of Chowkidari Tax payable by putnidar under putni settlement—See CHOWKIDARI TAX, 22 C. 680.

(3) For establishment of lakhiraj title and amendment of record of rights—See REGULATION III OF 1872 (SONTHAL PERGUNNAHS SETTLEMENT), 22 C. 473.

(4) For property wrongly taken in execution of decree—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 483.

(5) For sale of mortgaged property without redeeming prior mortgages—See MORTGAGE—SALE, 22 C. 33.

(6) To set aside sale—See SALE, 22 C. 738.

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(1) Issue of—See PRACTICE, 22 C. 889.

(2) Transmitted to local Court for service—See PRACTICE, 22 C. 889.

Surety.

Enforcement of security—Surety for amount of decree pending appeal—Execution of decree—Separate suit—Civ. Pro. Code, ss. 244, 253.—Where a surety has become security for the appellant in an appellate Court, under s. 545 of the Code of Civil Procedure, the security bond cannot be enforced in execution of the decree under s. 253, but a separate suit must be brought against the surety. TOKAN SINGH *alias* ROOP NARAIN SINGH v. UDWANT SINGH, 22 C. 25 ... 18

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And inheritance under Mitakshara Law—See BURDEN OF PROOF, 22 C. 85.

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Presumption as to permanent character of—See EVIDENCE, 22 C. 533.

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Right of, to cut down and appropriate trees—See LANDLORD AND TENANT, 22 C. 742.

Territorial Jurisdiction.

Of Foreign State—See FOREIGN COURT, 22 C. 222.

Theft.

(1) *Penal Code (Act* XLV *of* 1860), *ss.* 378 *and* 379—*Removal of debtor's property by creditor—Penal Code as drafted in* 1837, *s* 363.—With a view to coerce the complainant to pay a sum of Rs. 14, which he owed to the accused, three head of cattle worth Rs. 60 were removed from the complainant's homestead under the order of the accused: *Held*, the offence of theft was not committed by the accused. The illustrations to s. 378 of the Penal Code, indicate that it was the intention of the Legislature that, in order to have committed theft within the meaning of the section, the taker must have taken the thing with the intention of keeping it himself, or disposing of it for his own benefit, or in some way which would compel the owner to pay him money which he did not owe him in order to regain his property. The words "intending to take dishonestly any moveable property," in the above section, read with s. 23 and s. 24 of the Penal Code, mean "with the intention of gaining by unlawful means property to which he is not legally entitled." "To gain property by unlawful means" means "to gain the thing moved for the use of the gainer," and not "the gaining possession of it for a time for a temporary purpose." S. 363 of the Penal Code, as drafted in 1837, discussed. PROSONNO KUMAR PATRA v. UDOY SANT, 22 C. 669. 446

(2) *Wrongful gain — Wrongful loss—Penal Code (Act* XLV *of* 1860), *ss.* 23, 24 *and* 378—*Removal of debtor's property by creditor to enforce payment of debt.*—A creditor by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits the offence of theft as defined in s. 378 of the Penal Code. Sections 23 and 24 of the Penal Code discussed and explained. QUEEN-EMPRESS v. SRI CHURN CHUNGO, 22 C. 1017 (F.B.) ... 676

(3) See ACT I OF 1871 (CATTLE TRESPASS), 22 C. 139.

Tidal Navigable River.

Right of Fishery in—See FISHERY, 22 C. 252.

Title.

(1) Of purchaser holding decree on mortgage which preceded decree held by opponent.—See SALE, 22 C. 909.

(2) Suit for establishment of—See REGULATION III OF 1872 (SONTHAL PERGUNNAHS SETTLEMENT), 22 C. 473.

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(1) By Hindu executor to Administrator-General—See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 22 C. 788.

(2) Of Civil Case—See JURISDICTION, 22 C. 871.

(3) Of decree for execution—See EXECUTION OF DECREE, 22 C. 764.

(4) Or withdrawal of cases—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 898.

Transfer of Property Act (IV of 1882).

(1) S. 48—See MORTGAGE—SALE, 22 C. 33.

(2) *S. 53—Statutes 13 Eliz., c. 5 and 27 Eliz., c. 4—Voluntary transfers as against creditors or subsequent transferees for consideration—Notice—Registration—Duty of mortgagee in searching for prior incumbrances—Post nuptial settlement with power of appointment to wife—Deed of appointment in favour of children—Secrecy as evidence of fraud—Subsequent mortgage by wife and trustee of settlement without mention of deed of appointment.*—In 1870 the defendant *J* and her husband executed a post-nuptial settlement by which they assigned certain Municipal debentures to the defendant *E* (the brother of *J*) and one *G* "upon trust for *J* during her life and after her death as she should by deed or will appoint," and subsequently the trustees in pursuance of a power given them by the settlement sold the debentures and invested the proceeds in house property in Calcutta, such house and premises thereafter representing the trust property and being held by the trustees on the trusts of the settlement. On 17th December 1878, *E* retired from the trust and made over his interest to the remaining trustee *G*, and on the same day *J* executed a deed of appointment in favour of her children representing to her solicitor that she did so to protect the property from her husband. The deed of appointment was witnessed by *E* and was duly registered, but it is not mentioned in the deed which assigned the trust property to *G*, and no information of it was given to him, the deed remaining in *J's* custody and not being made over to *G*. In 1884, *G* retired from the trust and *E* became sole trustee in his place. In March 1884 money was raised by *J* and *E* on mortgage of the trust property to *G*, but no mention of the deed of appointment was made in the mortgage deed. *J's* husband died in October 1884, but neither then, nor on the occasion of another mortgage of the property in 1888, was any mention made of the deed of appointment, and there was nothing on the record of the case to show that the husband was ever in needy circumstances, or pressed his wife for money, or that he died leaving no property. In 1890 *E* and *J* mortgaged the house and premises to the plaintiffs, the mortgage deed (which was duly registered) reciting the settlement of 1870, and that "*J* has not made any irrevocable appointment of the said trust premises under the power of appointment given to her in the settlement," but making no mention of the deed of appointment executed by her in 1878. A deed of further charge was also executed by *J* and *E* in 1891 in favour of the plaintiffs also without any mention of the deed of appointment: this was also duly registered. Before execution of the mortgage of 1890 the plaintiffs' solicitors did not search the register of deeds further back than 1884, because they were dealing with persons who must have known of the exercise of

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the power of appointment, and who had given a covenant that no such exercise had been made, and because they then found that *G*, the former trustee, had taken a similar security himself in 1884 and must have been satisfied that no such blot existed on the title. They had moreover a letter from *G*'s solicitors saying that they had searched the register up to 1884. *J* first set up the deed of appointment as a defence in the present suit, which was brought on the mortgages against *E* and *J* and their children, and in which the plaintiffs sought to recover the amount advanced with interest, and prayed that the deed might be declared void as against them. In this suit *E* did not appear. The principal grounds of defence were that the mortgage deeds were not explained to *J*, that she was ill at the time, and left all the transactions to her brother *E*, and that she did not know the contents of the deeds which she contended were therefore not binding on her; that the deed of appointment was made in consideration of her natural love and affection for her children; and that the plaintiffs had notice of it. On the facts the lower Court (SALE, J.) found that she had full and complete knowledge of the contents of the mortgage deeds and was bound by them, and that there was gross fraud towards the plaintiffs on the part of *E* in suppressing the fact of the existence of the deed of appointment. *Held* by SALE, J., that according to the law which existed in India prior to the passing of the Transfer of Property Act, the deed of appointment was a voluntary conveyance and fraudulent within the meaning of the Statute 27 Eliz., c. 4, and void as against the plaintiffs as subsequent transferees for valuable consideration; the legal presumption of fraud which the Court was entitled to make on the cases decided on that statute rendering the question of notice or no notice immaterial. Section 53 of the Transfer of Property Act has not altered the law in that respect. The deed of appointment came within the definition of "transfer of property," given in that Act, there being nothing in the Act to suggest that it was intended to confine its operation to transfers by contract. The words of s. 53 "may be presumed to have been made with such intent as aforesaid," (*i.e.*, with a fraudulent intent), should be construed in accordance with the cases decided under the Statute 27 Eliz., c. 4. Even assuming that it was intended by s. 53 to exclude voluntary conveyances of which a subsequent transferee had notice from the presumption of fraud. *Held*, on the facts, that the plaintiffs had no notice of the deed of appointment. The doctrine of notice, if applied, must be applied in accordance with, and subject to, the definition of notice given in the Act itself. There was no actual notice, and there was not such an "abstention from inquiry or search" on the part of the plaintiffs as to fix them with constructive notice. The words "wilful abstention from inquiry and search" mean such abstention as would show want of *bona fides* on the part of the plaintiffs in respect of this particular transaction. *Held*, also that the doctrine of registration amounting to notice, as laid down in the case of 6 B. 168, had no application to the present case. Having regard to the terms of s. 53 of the Transfer of Property Act, that doctrine, if applicable, can only apply for the purpose, either of rebutting the presumption

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of fraud or of preventing the presumption of fraud from arising. If the true meaning of that section be that the Court is to presume fraud only in accordance with the facts of each particular case, the facts of the present case were amply sufficient to raise the presumption as regards the deed of appointment. That deed, therefore, was fraudulent, as against the plaintiffs, and they were entitled to a declaration that it was void and inoperative as against them. *Held*, on appeal (by PETHERAM, C.J. and NORRIS and O'KINEALY, JJ.) that, looking to the unusual way in which the transaction as to the deed of appointment was carried out, and the secrecy given to it, the result of which was to enable *E* and *J* to raise money on the trust property by inducing persons to believe that the whole title lay in themselves alone, and on the other facts in the case, apart from the presumption which might be made under s. 53 of the Transfer of Property Act, where a transfer is made gratuitously for a grossly inadequate consideration, *viz.*, that it may be presumed to have been made to defraud or defeat creditors, the decree of the Court below was correct. JOSHUA v. ALLIANCE BANK OF SIMLA, 22 C. 185 ... 125

(3) S. 54—*Delivery of possession under deed of sale unregistered where registration is optional—Delivery of property—Share in a tank—Tangible immoveable property—Question of fact—Second appeal.* —The defendants purchased a share in a tank in 1881, and the consideration being of a less amount than Rs. 100 and registration therefore optional, the deed of sale was unregistered. In 1886 the plaintiff purchased the same share from the same vendor under a registered deed of sale. It was found on the facts that the plaintiff purchased with notice of the defendants' previous purchase, and that the defendants had possession of the purchased share from the date of their purchase: *Held*, on appeal under the Letters Patent of the High Court, by TREVELYAN, J., upholding the decision of BEVERLEY, J. (HILL, J., dissenting), that the possession obtained by the defendants was a sufficient "delivery of the property" within the meaning of s. 54 of the Transfer of Property Act. *Per* TREVELYAN, J.—It is not necessary that there should be any formal making over of possession. *Per* HILL, J.—When the owner of immoveable property of a value less than Rs. 100 has executed to the intending buyer an instrument purporting to transfer the ownership of the property, and the instrument has not been registered, but the intending buyer has been placed in possession, the effect to be attributed to the delivery of possession depends on the intention of the parties, which is a question of fact that cannot be determined on second appeal. GUNGA NARAIN GOPE v. KALI CHURN GOALA, 22 C. 179 121

(4) Ss. 58, 60—See MORTGAGE—SALE, 22 C. 33.

(5) S. 67—See EXECUTION OF DECREE, 22 C. 859, 903.

(6) S. 67—See MORTGAGE—SALE, 22 C. 33.

(7) *Ss. 67, 99—Application for the attachment and sale of mortgaged property in execution of a decree obtained not in accordance with the Transfer of Property Act, though suit instituted after the passing of the Act.*—A mortgagee obtained a decree on the 15th February 1883 upon a mortgage bond, dated 18th January 1879. The decree

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simply provided that the plaintiff do obtain the amount of his claim, and that the mortgaged property should remain liable for the satisfaction of the debt. The judgment-creditor in execution of that decree sold one of the mortgaged properties, and afterwards assigned over the decree, and the assignee, on the 18th August 1894, applied for the execution of the decree by attachment and sale of another of the mortgaged properties. *Held* on the objection of the judgment-debtors, that s. 99 of the Transfer of Property Act was applicable to the case, and that the mortgaged property could not be sold, unless a suit under s. 67 of the Act be brought, and the procedure described by the Transfer of Property Act followed. The property, however, could be attached, as there is nothing in s. 99 prohibiting such attachment. CHANDRA NATH DEY v. BURRODA SHONDURY GHOSE, 22 C. 813 ... 538

(8) S. 74—See MORTGAGE—SALE, 22 C. 33.

(9) Ss. 85, 86, 88—See MORTGAGE—SALE, 22 C. 33.

(10) Ss. 88, 89—See MORTGAGE—SIMPLE, 22 C. 931.

(11) S. 89—See LIMITATION ACT (XV OF 1877), 22 C. 924.

(12) Ss. 91, 92, 96, 97—See MORTGAGE—SALE, 22 C. 33.

(13) S. 99—See EXECUTION OF DECREE, 22 C. 859, 903.

(14) S. 100—See EXECUTION OF DECREE, 22 C. 859.

(15) S. 107—See IMMOVEABLE PROPERTY, 22 C. 752.

(16) S. 108, cl. (*h*)—See LAND ACQUISITION ACT (X OF 1870), 22 C. 820.

(17) *S.* 108, *sub-s.* (*i*)—*Liability of a lessee for rent after transfer—Leases of non-agricultural character.*—To suits brought by a landlord against his lessee for rent based upon *kabuliyats*, the leases being of non-agricultural character, an assignee of the lessee was made a party defendant on his own application. It was contended, on behalf of the lessee, that under the common law of India it was competent for the tenant to rid himself of his liability by assignment or at any rate by assignment and notice thereof to his landlord. *Held*, that if there was such a common law in India enabling the tenant to put an end to his liability by transfer and notice, it did not at all events extend to leases of non-agricultural character; and that s. 108, sub-s. (*j*), of the Transfer of Property Act, which governed the case, must be construed without reading it as governed by, or interpreted with reference to, any such principle, and that after a transfer by the lessee and notice thereof to the landlord the liability of the lessee would not cease, merely at his pleasure without any act or consent on the part of the landlord. SASI BHUSHUN RAHA v. TARA LAL SINGH DEO BAHADUR, 22 C. 494 ... 330

Trees.

Right of tenant to cut down and appropriate—See LANDLORD AND TENANT, 22 C. 742.

Trespass.

See CRIMINAL TRESPASS, 22 C. 123, 391.

Unchastity.

See HINDU LAW (INHERITANCE), 22 C. 347.

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How indicated—See PLEADINGS, 22 C. 324.

Unlawful Assembly.

(1) *Common object—Murder—Prosecution of common object—Penal Code, s.* 149.—Neither of the cases of 11 B.L.R. 347, 20 W.R. Cr. 5 and 3 C.L.R. 49, lays down any hard and fast rule as to the circumstances under which one member of an unlawful assembly can be deemed guilty of an offence committed by another under the provisions of s. 149 of the Penal Code, and every case must be decided on its own merits. In dealing with such cases, while on the one hand it is necessary for the protection of the accused that he should not, merely by reason of his association with others as members of an unlawful assembly, be held criminally liable for offences committed by his associates, which he himself neither intended, nor knew to be likely to be committed, on the other hand, it is equally necessary for the protection of the peace that members of an unlawful assembly should not likely be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. Those two cases respectively emphasize the necessity of keeping these considerations in view. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of s. 149 may be different on different members of the same unlawful assembly. JAHIRUDDIN v. QUEEN-EMPRESS, 22 C. 306 ... 205

(2) Common object of—See RIOTING, 22 C. 276.

Unsoundness of Mind.

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Use and Occupation.

Decree for, in suit for rent—See IMMOVEABLE PROPERTY, 22 C. 752.

Verdict.

See ACQUITTAL, 22 C. 377.

Verification.

(1) Of power of attorney—See PRACTICE, 22 C. 491.

(2) Of written statement—See WRITTEN STATEMENT, 22 C. 268.

Village Watchman.

Or Gorait, Jagir granted to—See SERVICE TENURE, 22 C. 938.

Voluntary Payment.

Contract Act (IX *of* 1872), *ss.* 69, 70—*Money paid for benefit of another—Money paid to protect property from sale in execution of decree for arrears of rent.*—Certain immoveable property was inherited by *S*, the mother of the plaintiff, from her husband, and during her tenure of it, she alienated it by deed of-sale to the defendants. *S* died in April 1890, and the estate then devolved upon plaintiff

Voluntary Payment—(*Concluded*). PAGE

an only daughter (there being no male issue). In 1890 the property in possession of the defendants was, at the suit of a person who was the landlord, ordered to be sold together with other properties of the defendants for arrears of rent, due in the lifetime of *S*, and to prevent the sale the plaintiff paid the amount of the decree. In a suit for possession of the property and for a refund of the sum paid by the plaintiff to stop the sale, the defendants claimed an absolute interest in the property, but the Courts below found that the alienations by *S* to the defendants were not made for legal necessity, and were therefore invalid. *Held*, that the payment made by the plaintiff was not a voluntary payment, but was one which she was entitled to recover from the defendants. It being a question at the time whether the property belonged to the plaintiff or to the defendants, the payment to stop the sale was one in which the plaintiff was interested sufficiently to bring the case within s. 69 of the Contract Act. S. 70 was also applicable, as the payment relieved the defendants from liability to their landlord and was made for the defendants, and not gratuitously and the defendants enjoyed the benefit of such payment. The principles laid down in the cases of 7 C. 648; 8 I.A. 93; 12 C. 213 and 15 C. 656, were held to govern this case. BAMA SUNDARI DASI v. ADHAR CHUNDER SIRCAR, 22 C. 28 ... 20

Voluntary Transfer.

As against creditors or subsequent transferees for consideration—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Voters.

List of—See MUNICIPAL ELECTION, 22 C. 717.

Waiver.

Of objection to verification—See WRITTEN STATEMENT, 22 C. 268.

Warrant.

(1) Of attachment, service of—See PENAL CODE (ACT XLV OF 1860), 22 C. 596.

(2) Of distress—See CRIM. PRO. CODE (ACT X OF 1882), s. 386, 22 C. 935.

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Withdrawal.

Or transfer of cases—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 898.

Witness.

Attestation by—See STAMP ACT (I OF 1879), 22 C. 757.

Words and Phrases.

(1) "Accused"—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 493.

(2) "Affecting the decision of the case"—See APPEAL (GENERAL), 22 C. 981.

(3) "Any other animals"—See PENAL CODE (ACT XLV OF 1860), 22 C. 457.

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(4) "Any such offence"—See COMMITMENT, 22 C. 1004.

(5) "Bull"—See PENAL CODE (ACT XLV OF 1860), 22 C. 457.

(6) "Cow"—See PENAL CODE (ACT XLV OF 1860), 22 C. 457.

(7) "Date of the decree"—See ACT I OF 1879 (CHOTA NAGPORE LANDLORD AND TENANT PROCEDURE), 22 C. 467.

(8) "Descendants"—See GHATWALI TENURE, 22 C. 156.

(9) "Dishonestly"—See CRIMINAL BREACH OF TRUST, 22 C. 313.

(10) "Final"—See APPEAL (TO PRIVY COUNCIL), 22 C. 928.

(11) "Fraudulently"—See CRIMINAL BREACH OF TRUST, 22 C. 313.

(12) "Intending to take dishonestly any moveable property"—See THEFT, 22 C. 669.

(13) "Magistrate passing a decision"—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 387.

(14) "May be presumed to have been made with such intent as aforesaid"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

(15) "Minor offence"—See CRIM. PRO. CODE (ACT X OF 1882), 22 C. 1006.

(16) "Proprietor"—See REGULATION III OF 1872 (SONTHAL PERGUNAHS SETTLEMENTS), 22 C. 473.

(17) "Suit or particular business"—See LIMITATION ACT (XV OF 1877), 22 C. 943.

(18) "To be executed"—See PENAL CODE (ACT XLV OF 1860), 22 C. 596.

(19) "To gain property by unlawful means"—See THEFT, 22 C. 669.

(20) "Verdict"—See ACQUITTAL, 22 C. 377.

(21) "Wilful abstention from enquiry and search"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 22 C. 185.

Written Statement.

Verification of written statement—Verification on behalf of Corporation—Principal officer of Corporation or Company—Civ. Pro. Code (Act XIV of 1882), ss. 115, 435—Practice—Waiver of objection to verification.—The Civ. Pro. Code, by ss. 115 and 435, enables a principal officer of a Corporation to verify a plaint or written statement, and it is therefore not necessary that permission for that purpose should be obtained, but it should be shown in cases to which s. 435 applies that the person purporting to verify a plaint or a written statement on behalf of a Corporation or Company is a principal officer of the Corporation, and is able to depose to the facts of the case. If the plaint or written statement contains a statement to that effect, verification in the usual form would probably be sufficient. Where suits had been filed against the East Indian Railway Company the plaints in which described the defendant Company as a Corporation, and an application was made for the admission on behalf of the defendant Company of written statements signed "The East Indian Railway Company" by their constituted Attorney and Agent Richard Gardiner," who was described in the verification as the "Agent of the defendant Company." and the written statements contained no statement to the effect that he was a principal officer of the defendant Company and able to depose to the facts of the case: *Held*, that such evidence

Written Statement—(*Concluded*). PA

should be supplied by affidavit before the written statements could be admitted. The provisions in the Code relating to the verification of written statements, however, being intended for the protection of plaintiffs, their observance might be waived by the plaintiffs, and if they were prepared to waive objections to the sufficiency of the verification further evidence of the nature indicated might be dispensed with. SREENATH BANERJEE v. EAST INDIAN RAILWAY COMPANY, 22 C. 268 ... 180

Wrongful Gain.

See THEFT, 22 C. 669, 1017.

Wrongful Loss.

See THEFT, 22 C. 669, 1017.

Zemindar.

Resumption of tenure by—See SERVICE TENURE, 22 C. 938.

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